Supreme Court, U.S.
FILED

97 1067 DEC 24 1997

OFFICE OF THE CLERK

NO._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1997

COLEMAN OIL COMPANY, INC., a New Hampshire corporation,

Petitioner,

v.

THE CIRCLE K CORPORATION, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Carolyn J. Johnsen
Joseph A. Schenk
Counsel of Record
HEBERT, SCHENK & JOHNSEN, P.,C.
1440 East Missouri Avenue, Suite 125
Phoenix, AZ 85014
602-248-8203
Attorneys for Petitioner

103 pp

QUESTION PRESENTED FOR REVIEW

Whether a bankruptcy court has the implied, non-statutory authority to abrogate fundamental contract rights by altering the terms of an existing contract on the grounds that such alterations "effectuate the objectives of 11 U.S.C. §365" by allowing a debtor to renew an executory contract when its prior defaults would otherwise prevent it from doing so?

LIST OF PARTIES

The parties are the petitioner, Coleman Oil Company, Inc., a New Hampshire corporation ("Coleman") and Respondents, The Circle K Corporation, Circle K Convenience Stores, Inc., Circle K Management Company, Lar-lin, Inc., First Circle Properties, Inc., Utotem, Inc., Utotem Markets of Arizona, Inc., U Totem of Alabama Inc., U-tote'm of Colorado Inc.,U-tote-m of Miami, Inc., Tic Toc Systems, Inc., Monterre Properties, Inc., Shop & Go, Inc., Circle K General, Inc., Circle K Hawaii, Inc., Combined Aviation Co., Charter Marketing Company, Charter Marketing Company (Connecticut), Mr. B's Oil Co., Inc., Mr. B's Food Mart, Inc., NPI Corporation, Old Colony Petroleum Company, Inc., New England Petroleum Distributors, Inc., and 44th Street & Camelback Limited Partnership ("Debtors").

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

LIST OF PARTIES ii

TABLE OF AUTHORITIES v

DISCUSSIONS AND OPINIONS OF LOWER COURTS 1

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 4

I. THIS CASE PRESENTS AN IMPORTANT QUESTION OF FIRST IMPRESSION REGARDING THE EXTENT TO WHICH THE BANKRUPTCY COURT HAS THE IMPLIED AUTHORITY TO ABROGATE EXISTING CONTRACT RIGHTS. 4

II. THE NINTH CIRCUIT COURT OF APPEALS DECISION DEPARTS FROM ALL RECOGNIZED RULES OF STATUTORY CONSTRUCTION 5

A. Section 365 of the Bankruptcy Code Contains No Provision Supporting the Ninth Circuit's Ruling. 6

B. The Ninth Circuit's Ruling Is Contrary to Principles Embodied in the Bankruptcy Code. 10

C. The Ninth Circuit Has Violated the "Plain Meaning" Rule 13

D. The Ninth Circuit's Ruling Has A Broad And Negative Impact On The Commercial Marketplace. 16

CONCLUSION 17

APPENDIX 18

TABLE OF AUTHORITIES

CASES

Griffin v. Oceanic Contractors, Inc., 458 U.S. 569, 571 (1982) 13

127 F.3d 904 (9th Cir. 1997) 2

127 F.3d at 909 10

127 F.3d at 910 8

127 F.3d at 911 . . . . . 3, 5, 7, 16

190 B.R. 370 (Bankr. 9th Cir. 1996) 2

190 B.R. at 376. 10

190 B.R. at 379. 7

190 B.R. at 380. 13

American Airlines, Inc. v. Wolens, 513 U.S. 219, 230, 115 S.Ct. 817, 824 (1995) 4

City of Covington v. Covington Landing Limited Partnership, 71 F.3d 1221, 1226 (6th Cir. 1995) 12

Coleman Oil Company, Inc., a New Hampshire Corporation, Plaintiff v. The Circle K Corporation, et al., Defendants, Chapter 11, Case Nos. B-90-5052 PHX GBN to B-90-5075 PHX GBN (Jointly Administered), Adversary No. 91-974-GBN,(Bankruptcy D. Ariz., April 6, 1994) 1

Hazen First State Bank v. Speight, 888 F.2d 574, 576 (8th Cir. 1989) 11

In re Advent Corp., 24 B.R. 612, 614 (Bankr. 1st Cir. 1982) 11

In re Carroll, 903 F.2d 1266, 1271 (9th Cir. 1990) 11

In Re Cook United, Inc., 53 B.R. 342, 345 (Bankr.N.D.Ohio 1985) 9

In Re Crabb, 48 B.R. 165 (Bankr. D. Mass. 1985) 16

In re Gull Air, Inc., 890 F.2d 1255, 1262 (1st Cir. 1989) .. 11

In re G-N Partners, 48 B.R. 462, 466 (Bankr. D. Minn. 1985) 12

In re Handy Andy Home Improvement Centers, Inc., 196 B.R. 87, 95 (Bankr.N.D.Ill. 1996, aff'd, 1997WL 619824 (1997) 14, 15

In re Intermet Realty Partnership, 26 B.R. 383 (Bankr.E.D.Pa. 1983) 12

In re M.S. Freight Distribution, Inc., 172 B.R. 976, 979 (Bankr. W.D. Wa.) 14

In re Pacific-Atlantic Trading Co., 27 F.3d 401, 403 (9th Cir. 1994) 14

In re Paul Harris Stores, Inc., 148 B.R. 307, 313-14 (S.D.Ind. 1992) 14

In re S.E. Nichols Inc., 120 B.R. 745, 747 (Bankr. S.D.N.Y. 1990) 12

In re Thomas, 883 F.2d 991, 995 (11th Cir. 1989), cert. denied, 497 U.S. 1007 (1990) 11

In re Tirenational Corp., 47 B.R. 674 (Bankr.N.D.Ohio 1985) 10

In re Webster Clothes, Inc., 36 B.R. 260, 1263 (D.Md. 1984) 15

Lectherman v. Tarrant County Narcotics Intelligence And Coordination Unit, 507 U.S. 163, 168 (1993) 10

Matter of Schokbeton Indus., Inc., 466 F.2d 171 (5th Cir. 1972) 9

Midlantic National Bank v. New Jersey Department of Environmental Protection, 474 U.S. 494, 502 (1986) 9

Moody v. Amoco Oil Co., 734 F.2d 1200, 1213 (7th Cir. 1984) 11

N.L.R.B. v. Bildisco and Bildisco, 465 U.S. 513, 532 (1984) 12

National Boiler Mktg. Ass'n v. United States, 436 U.S. 816, 820 (1978) 17

Patterson v. Shumate, 504 U.S. 753, 761 (1992) 13

Rice v. Sioux City Cemetery, 349 U.S. 70, 79 (1955) 17

Richmond Leasing Co. v. Capital Bank, 762 F.2d 1303, 1311 (5th Cir. 1985) 12

Santa Fe, Prescott, and Phoenix Railway Co. v. Grant Bros. Construction Co., 228 U.S. 177, 188 (1913) 17

States v. Ruzicka, 329 U.S. 287 (1946) 17

U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 793 fn. 9 (1995) 10

U.S. v. Ron Pair Enterprises, Inc., 489 U.S. 235, 244 . . 9, 13

STATUTES

11 U.S.C. §157 3

11 U.S.C. §362 . . . . . 4, 11

11 U.S.C. §365 . . . . . i-10, 12-17

11 U.S.C. §503 14

11 U.S.C. §541 11

11 U.S.C. §727 4

28 U.S.C. §1254(1) 2

LEGISLATIVE HISTORY

H.R. Rep. No. 595, 95th Cong., 1st Sess., reprinted in 1978 U.S. Code Cong. & Ad. News 5787. 11

H.R. Rep. No. 95-595, 95th Cong., 1st Sess., 348-9 (1977). See Senate Report No. 95-989, 95th Cong., 2d Sess. 59 (1978) 8

H.R.Rep. No. 882, 95th Cong., 2d Sess.1984, reprinted in 1984 U.S. Code Cong. & Ad. News 576. 15

No._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1997

COLEMAN OIL COMPANY, INC., a New Hampshire corporation,

Petitioner,

v.

THE CIRCLE K CORPORATION, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Coleman Oil Company, Inc. respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, filed October 22, 1997.

DISCUSSIONS AND OPINIONS OF LOWER COURTS

On April 6, 1994 the United States Bankruptcy Court for the District of Arizona issued its Order granting summary judgment in favor of Debtors New England Petroleum Distributors, Inc. and Old Colony Petroleum permitting the assumption of certain leases of real property owned by Coleman. Coleman Oil Company, Inc., a New Hampshire Corporation, Plaintiff v. The Circle K Corporation, et al., Defendants ("In re Circle K Corporation, et al."), Chapter 11, Case Nos. B-90-5052 PHX GBN to B-90-5075 PHX GBN (Jointly Administered), Adversary No. 91-974-GBN, docket at 73 (Bankr. D. Ariz., April 6, 1994). The Order was not officially reported but has been reprinted in the Appendix at

page 1a.

Coleman appealed the Order to the Bankruptcy Appellate Panel for the Ninth Circuit ("BAP") which affirmed the lower court in a split decision with opinions written by both the majority and dissenting judges. An initial decision was released by the BAP on December 11, 1995, but an amended Opinion was issued on January 8, 1996. The BAP Opinion is reported at 190 B.R. 370 (Bankr. 9th Cir. 1996), and is reprinted in the Appendix at page 9a.

The matter was appealed to the Ninth Circuit Court of Appeals which affirmed the BAP, again in a split decision. The Ninth Circuit Opinion, filed on October 22, 1997, is reported at 127 F.3d 904 (9th Cir. 1997) and is reprinted in the Appendix at page 43a.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit filed its Opinion on October 22, 1997. The jurisdiction of this Court to review the decision of the United States Court of Appeals for the Ninth Circuit is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

This Petition involves the proper interpretation of 11 U.S.C. §365 which has been reproduced in its entirety in the Appendix at page 60a.

STATEMENT OF THE CASE

In 1977, Coleman Oil Company ("Coleman") leased to Pickering Oil Heat, Inc. ("Pickering") six retail gasoline stores located in New Hampshire and Maine. Through a series of acquisitions and mergers, two subsidiaries of the Circle K Corporation eventually claimed to be the holders of the leasehold interests originally held by Pickering. Each identical lease agreement provided for a ten year term with options to renew for two additional five year terms, provided that none of the leases were in default at the time the options

were exercised.

On May 15, 1990, the Circle K Corporation and its subsidiaries ("Debtors") filed a Chapter 11 bankruptcy petition and immediately requested an extension of the 60-day deadline in which to assume or reject the Coleman leases pursuant to 11 U.S.C. §365(d)(4). The Bankruptcy Court granted the extension which ultimately continued for nearly three years.

In 1992 the Debtors attempted to exercise the second renewal option to extend the terms of the Coleman leases, even though defaults in at least some of the leases existed. In March and April of 1993, the Debtors filed motions to assume the Coleman leases and subsequently filed a motion for summary judgment with respect to the issues raised in the assumption motions. Federal jurisdiction over the dispute was invoked pursuant to 11 U.S.C. §157(b). The Bankruptcy Court granted the Debtors' motion for summary judgment by Order dated April 6, 1994 ("Order") and permitted the Debtors to assume the leases.

Coleman appealed the Order to the Bankruptcy Appellate Panel for the Ninth Circuit ("BAP"). The BAP affirmed, holding that Coleman had failed to raise a material issue of fact regarding the Debtors' status as assignees of the leases and that the Debtors' exercise of the two renewal options was valid even though defaults existed at the time of the second extension. Judge Barry Russell dissented, concluding that Section 365 of the Bankruptcy Code did not authorize the Bankruptcy Court to modify the express terms of the leases.

Coleman appealed to the Ninth Circuit Court of Appeals which affirmed the BAP's decision. The Ninth Circuit held that the Debtors could exercise their final option to renew the leases without first curing their pre-petition defaults, stating that "no principle of bankruptcy or contract law precludes us from permitting the Debtors here to extend their leases in a manner contrary to the leases' terms, when to do so will effectuate the purposes of section 365." 127 F.3d at 911. Judge Pamela Ann Rymer dissented in part, opining that

nothing in 11 U.S.C. §365 allows debtors to disregard the requirements of their leases and renew while in default.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS AN IMPORTANT QUESTION OF FIRST IMPRESSION REGARDING THE EXTENT TO WHICH THE BANKRUPTCY COURT HAS THE IMPLIED AUTHORITY TO ABROGATE EXISTING CONTRACT RIGHTS.

Private contract rights should not be lightly regarded by the courts. As this Court has recognized, "[m]arket efficiency requires effective means to enforce private agreements." American Airlines, Inc. v. Wolens, 513 U.S. 219, 230, 115 S.Ct. 817, 824 (1995). Consequently, courts should be extremely reluctant to alter private contract rights on the basis of a perceived need to "effectuate" a statute which does not expressly provide for such a result.

Without question, there are provisions within the Bankruptcy Code which can have an impact on private contract rights. For example, 11 U.S.C. §362 imposes an automatic stay upon the filing of a bankruptcy petition which prevents creditors from taking any action to enforce their contract rights against the debtor without first obtaining relief from the Bankruptcy Court. 11 U.S.C. §365(e) generally prevents the enforcement of provisions which make the filing of a bankruptcy grounds for terminating or modifying an executory contract or unexpired lease. Ultimately, 11 U.S.C. §727 allows bankruptcy debtors to completely discharge pre-petition contract obligations. All of these provisions have one thing in common — each represents a circumstance where Congress has made an express determination that the benefits to be gained from a national bankruptcy policy outweigh the preservation of private contract rights.

The implication by a bankruptcy court of the power to alter existing contracts in furtherance of a debtor's efforts to reorganize creates two significant problems. First, it injects bankruptcy courts into the legislative arena, requiring the

court to assume that the absence of express statutory language was accidental and forcing it to anticipate how Congress would have weighed the interest in enforcing private contracts against a bankruptcy policy favoring the reorganization of debtors. Second, it adversely impacts private market forces by adding unpredictability to the contract formation process. When Congress enacts a law that affects private contract rights, a sophisticated marketplace will account for this impact and place a monetary value on it. However, when a court finds the implied authority to modify contract rights, the results are far less predictable and the market is less able to make an appropriate adjustment.

In the present case, the Ninth Circuit has held as a matter of first impression that a bankruptcy debtor is not bound by an unambiguous provision in an executory lease which requires it to cure all defaults as a condition for exercising a renewal option. Prior to this case, no court had ever addressed this specific legal issue. As Judge Rymer noted in her dissenting opinion below, "[t]he path to deciding whether 11 U.S.C. §365 allows a lessee debtor in bankruptcy to exercise an option to renew despite being in default, contrary to an express condition precedent in the lease, is uncharted." 127 F.3d at 911. It is respectfully submitted that by answering this question in the affirmative, the panel majority has made a wrong turn.

II. THE NINTH CIRCUIT COURT OF APPEALS DECISION DEPARTS FROM ALL RECOGNIZED RULES OF STATUTORY CONSTRUCTION

11 U.S.C. §365 permits the assumption or rejection of an executory contract or lease. It does not empower a court to rewrite contractual terms. In this case, the Ninth Circuit has sanctioned the abrogation of contractual rights and has sweepingly held that bankruptcy policy justifies such interference. Nowhere has Congress expressly granted such authority to the Bankruptcy Court.

The leases at issue provide as follows:

> Lessee shall have two (2) additional and successive terms of five (5) years . . . , by giving Lessor at least six (6) months written notice . . . , provided that Lessee's right to extend is conditioned upon the Lessee not being in default hereunder and is not in default of payments under any of the other leases . . . (emphasis added).

Thus, there were two conditions precedent to exercising the renewal option: notice and an absence of default. Although there is no dispute that the Debtors failed to meet the second prerequisite, the courts below determined that the option could be exercised and the term of the leases extended. In so ruling, they effectively excised a material provision of the parties' agreement and substituted a judge-made term. This is a step which is not contemplated by the Bankruptcy Code and which can only lead to unpredictability in the commercial marketplace.

This petition should be granted because the Ninth Circuit decision violates fundamental principles of statutory construction. It creates out of whole cloth a rule of law which effectively authorizes the bankruptcy court to modify executory contracts whenever doing so would assist a debtor's efforts to reorganize.

A. Section 365 of the Bankruptcy Code Contains No Provision Supporting the Ninth Circuit's Ruling.

The Ninth Circuit majority attempts to characterize its decision as an interpretation of 11 U.S.C. §365. However, as Judge Rymer aptly noted in her dissent,

> . . . nothing in §365 . . . allows debtors to disregard their leases and renew while in

default. . . .

> Section 365 does not extend the time to exercise the option or to meet conditions precedent. Nor does §365 give the debtor the right to opt to renew a contract that is in default when the contract by its terms requires that a default first be cured. To hold otherwise rewrites the lease and, as I read it, §365. 127 F.3d at 911.

Similarly, Judge Russell, dissenting from the BAP decision stated,

> I know of no provision in the Bankruptcy Code which gives a debtor in possession the right to exercise an option without also curing any default as required by the very contract which gives the lessee the right to exercise the option. Although the majority argues that §365 abrogates an important right of the lessor in the lease, i.e., the right to have all defaults cured when the option is exercised, they point to no specific part of §365 to achieve this result.
>
> There is nothing in §365 that extends the time to exercise the option and the fulfillment of any conditions precedent, such as not being in default, at the time of the purported exercise. 190 B.R. at 379.

A review of §365 substantiates the dissenters' position. Nevertheless, the Ninth Circuit majority reasoned that rewriting a contract is permissible because "all kinds of interferences with contractual rights occur in bankruptcy proceedings." 127 F.3d at 910. It cited as support for this proposition §365(a) which permits the rejection of an entire contract, the automatic stay, and the debtor's ability to cure a default even though the contract does not provide for cure. But, in each of these cases, Congress has specifically delineated an exception to the enforcement of a contractual term. For example, the fact that ipso facto clauses are unenforceable is explicitly set forth in §365(e). The debtor's power to assume or reject and to cure defaults is expressly provided for in §365(a) and (b). Obviously, when Congress desired to permit a contractual modification in bankruptcy, it so legislated. Nothing in §365 remotely suggests that Congress has authorized the court to abrogate a nondebtor party's contract rights on an ad hoc basis. In fact, the legislative history of §365 supports just the opposite conclusion:

> The unenforcibility of ipso facto or bankruptcy clauses proposed under this section will require the courts to be sensitive to the rights of the nondebtor party to executory contracts and unexpired leases. If the trustee is to assume a contract or lease, the court will have to insure that the trustee's performance under the contract or lease gives the other contracting party the full benefit of his bargain. H.R. Rep. No. 95-595, 95th Cong., 1st Sess., 348-9 (1977). See Senate Report No. 95-989, 95th Cong., 2d Sess. 59 (1978). (emphasis added)

This Court has recognized that Congress did not intend for

the Bankruptcy Code to obliterate general contract law. Congress has repeatedly expressed its legislative determination "that the trustee [or debtor-in-possession] is not to have carte blanche to ignore non-bankruptcy law." U.S. v. Ron Pair Enterprises, Inc., 489 U.S. 235, 244, citing Midlantic National Bank v. New Jersey Department of Environmental Protection, 474 U.S. 494, 502 (1986).

Other courts addressing similar facts have also recognized their limited authority to modify private contracts. For example, in In Re Cook United, Inc., 53 B.R. 342, 345 (Bankr.N.D.Ohio 1985), the court stated:

> Debtor is requesting this Court to rewrite the leases and Section 365 of the Bankruptcy Code, by holding that even though it was in default, Debtor had a right to exercise its option to renew the leases prior to its assuming said leases and curing the defaults. This Court cannot do so. The bankruptcy court has no authority to modify or nullify contractual provisions ... Matter of Schokbeton Indus., Inc., 466 F.2d 171 (5th Cir. 1972). . . .
>
> To allow Debtor to exercise the option without assuming the lease would be a substantial interference with the contractual rights of the lessor, because he would not know if the lessee intended to remain, the very thing for which he bargained. Where the lessor has requested assumption or rejection, Debtor must assume before it

> may exercise an option to renew. In order for Debtor to reap the benefits of a contract, it must at the same time bear the burdens of that contract. In re Tirenational Corp., 47 B.R. 674 (Bankr.N.D.Ohio 1985). (emphasis added)

Therefore, the Ninth Circuit's interpretation of §365 violates an accepted maxim of statutory construction, expressio unius est exclusio alterius — the expression of one thing is the exclusion of another. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 793 fn. 9 (1995); Lectherman v. Tarrant County Narcotics Intelligence And Coordination Unit, 507 U.S. 163, 168 (1993). Congress has dictated that certain contract modifications are warranted in furtherance of bankruptcy policy. These are set forth in the Bankruptcy Code. Congress did not provide for court-orchestrated contractual bargaining. That is what occurred in this case when the Ninth Circuit advocated a rule of law permitting the Bankruptcy Court to override the parties' agreement in order to "effectuate" §365.

B. The Ninth Circuit's Ruling Is Contrary to Principles Embodied in the Bankruptcy Code.

The Ninth Circuit found "'the purpose behind §365 is to balance the state law contract right of the creditor to receive the benefit of his bargain with the federal law equitable right of the debtor to have an opportunity to reorganize.' ... The lessor will then get the benefit of its bargain upon assumption, when the debtor lessee must cure the defaults." 127 F.3d at 909, quoting from BAP Opinion, 190 B.R. at 376.

But this ruling is a derogation of principles embodied in §365 and other sections of the Bankruptcy Code. The property of a debtor, including contractual rights, enters the bankruptcy estate intact. The Seventh Circuit has stated:

> [W]hatever rights a debtor has

> in property at the commencement of the case continue in bankruptcy — no more, no less. Section 541 is not intended to expand the debtor's rights against others more than they exist at the commencement of the case.

Moody v. Amoco Oil Co., 734 F.2d 1200, 1213 (7th Cir. 1984) citing H.R. Rep. No. 595, 95th Cong., 1st Sess., reprinted in 1978 U.S. Code Cong. & Ad. News 5787. See also In re Thomas, 883 F.2d 991, 995 (11th Cir. 1989), cert. denied, 497 U.S. 1007 (1990).

More specifically, several Circuits including the Ninth , are in accord that nothing in the Bankruptcy Code enlarges a debtor's rights to extend the term of an executory contract.

> The automatic stay does not toll the mere running of time under a contract, and thus it does not prevent automatic termination of the contract ... Section 362 does not give a debtor greater rights in a contract. Thus, debtors cannot rely on Section 362 to prevent termination of the contracts. Moody v. Amoco Oil Co., 734 F.2d at 1213.

See also Hazen First State Bank v. Speight, 888 F.2d 574, 576 (8th Cir. 1989); In re Carroll, 903 F.2d 1266, 1271 (9th Cir. 1990).

Similarly, the First Circuit in In re Gull Air, Inc., 890 F.2d 1255, 1262 (1st Cir. 1989) held that "when a debtor's proprietary interest expires by operation of an express condition, the Bankruptcy Code does not preserve that interest and prevent termination." See also In re Advent Corp., 24 B.R. 612, 614 (Bankr. 1st Cir. 1982) ("The

Bankruptcy Code neither enlarges the rights of a debtor under a contract, nor prevents the termination of a contract by its own terms."); In re G-N Partners, 48 B.R. 462, 466 (Bankr. D. Minn. 1985) ("Nothing in §365 gives the trustee the right to extend indefinitely a time provision in an option any more than a trustee could extend the right to occupancy under a lease past the stated lease period by purporting to assume it."); In re Internet Realty Partnership, 26 B.R. 383 (Bankr.E.D.Pa. 1983) ("Time is always of the essence in an option contract and, unless exercised, an option expires on the specified date ... The filing of a petition for reorganization under Chapter 11 does not expand the rights of the debtor under an option agreement.").

The Ninth Circuit's decision permitting bankruptcy courts to engage in arbitrary contractual redrafting does not square with this well-settled principle that the material terms of a pre-petition contract are to be preserved. It essentially authorizes bankruptcy courts to rewrite executory contracts whenever doing so would enhance a debtor's ability to reorganize.

In addition, the Ninth Circuit's ruling does not comport with another well-established principle that a debtor cannot elect certain terms it desires to assume and reject others; it must assume cum onere. N.L.R.B. v. Bildisco and Bildisco, 465 U.S. 513, 532 (1984). See also Richmond Leasing Co. v. Capital Bank, 762 F.2d 1303, 1311 (5th Cir. 1985); City of Covington v. Covington Landing Limited Partnership, 71 F.3d 1221, 1226 (6th Cir. 1995) (Neither the debtor nor the bankruptcy court may excise material obligations owing to the non-debtor contracting party.); In re S.E. Nichols Inc., 120 B.R. 745, 747 (Bankr. S.D.N.Y. 1990) ("It is well-settled that a debtor cannot assume part of an unexpired lease while rejecting another part; the debtor must assume the lease *in toto* with both the benefits and burdens intact.").

It is illogical that the same principle would not apply pre-assumption. Surely, Congress did not intend that a debtor would be accorded the right to revise a contract prior to assuming it when it is not permitted to do so after assumption.

Under the guise of fostering reorganization, the Ninth Circuit has created a rule of law which has no conceptual support in any other facet of bankruptcy law. Judge Russell pinpointed the ramifications of such a result:

> Upon close scrutiny, those cases represent judges 'legislating' a result with no basis under §365, in order to achieve a result which those courts felt would better serve some bankruptcy purpose. As the majority states: 'This policy also balances the contract rights of the landlord, while protecting the debtor's rights to the §365 period under which to decide whether to assume or reject the lease.' In my opinion, the balancing act is an improper taking of the lessor's bargained for contractual rights. 190 B.R. at 380.

C. The Ninth Circuit Has Violated the "Plain Meaning" Rule

This Court has held that the "plain meaning of legislation should be conclusive, except in 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." U.S. v. Ron Pair Enterprises, Inc., 489 U.S. 235, 242 (1989), quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 569, 571 (1982); See also Patterson v. Shumate, 504 U.S. 753, 761 (1992). The Ninth Circuit has given no credence to the unequivocal language of §365 (d)(3) which requires debtors to abide by their post-petition lease obligations prior to assumption or rejection.

Section 365 (d)(3) provides that:

> The trustee shall timely perform all the obligations of the debtor, except those specified in §365 (b)(2), arising from and after the order for relief under any unexpired lease of non-residential real property, until such lease is assumed or rejected, notwithstanding §503 (b)(1) of the this title . . . (emphasis added).

In holding that the renewal option could be exercised, notwithstanding the existence of an uncured default, the Ninth Circuit reached an interpretation of §365 which defies the clear language of the statute. The requirement to "timely perform all obligations" arising after the bankruptcy filing is absolute, and the Ninth Circuit had no statutory basis for eliminating the Debtors' burden to fulfill all conditions precedent to the exercise of its option to renew the Coleman leases. See In re M.S. Freight Distribution, Inc., 172 B.R. 976, 979 (Bankr. W.D. Wa.) ("This court therefore concludes that 'all obligations' means just that.").

Section 365(d)(3) was enacted in 1984 "to ameliorate the immediate financial burden borne by lessors of nonresidential property during the period in which trustees decided whether to assume a lease." In re Pacific-Atlantic Trading Co., 27 F.3d 401, 403 (9th Cir. 1994). See also In re Handy Andy Home Improvement Centers, Inc., 196 B.R. 87, 95 (Bankr.N.D.Ill. 1996), aff'd, 1997 WL 619824 (1997)); In re Paul Harris Stores, Inc., 148 B.R. 307, 313-14 (S.D.Ind. 1992). The legislative history for this provision fully supports this conclusion.

> [T]he landlord is forced to provide current services — the use of its property, utilities, security, and other services — without current payment. No other creditor is put in this

> position. In addition, the other tenants often must increase their common area charge payments to compensate for the trustee's failure to make the required payments for the debtor. The bill would lessen these problems by requiring the trustee to perform all the obligations of the debtor under a lease of nonresidential real property at the time required in the lease. (Emphasis added).
>
> H.R.Rep. No. 882, 95th Cong., 2d Sess.1984, reprinted in 1984 U.S. Code Cong. & Ad. News 576.

This congressional intent and the language of the statute are in accord; the purpose of §365(d)(3) is to protect the landlord who is bound to a pre-petition lease by requiring the debtor to abide by the requirements of the lease until it is assumed or rejected. See In re Handy Andy Home Improvement Centers, Inc., 196 B.R. at 95.

In this case, the Ninth Circuit ignored the precise mandate of §365(d)(3) in ruling that the Debtors could exercise the renewal option without meeting the post-petition conditions for extending the lease term. Under the clear language of the statute, these were obligations that had to be timely performed — the price, according to Congress, paid by the debtor to a landlord forced against its will to provide preassumption services.

In reaching its decision, the court below relied upon the reasoning of In re Webster Clothes, Inc., 36 B.R. 260, 1263 (D.Md. 1984), and that court's conclusion that the goal of §365 is "the preservation of the status quo until the debtor-in-possession decides whether to assume or reject." Significantly, Webster was decided prior to the 1984 amendments to the Bankruptcy Code. If the Ninth Circuit

had followed the plain language of §365(d)(3) as passed by the 1984 amendments, the preservation of the status quo would have required strict compliance with lease provisions, including the requirement that all defaults be cured prior to the exercise of any renewal options.

For whatever reason, the Ninth Circuit was unduly concerned with the notion that requiring the Debtors to cure their defaults prior to exercising the renewal option had the practical effect of forcing an early decision to assume or reject. But this concern has no place in a proper analysis of §365(d)(3). For example, if the Debtors had failed to meet the notice precondition to exercising the option as opposed to the cure requirement, it is doubtful that the court's analysis would have become so strained. If the Debtors had simply failed to give timely notice of an intent to renew, it is fairly clear that the lease option would have expired because the Debtors would have failed to meet a contractual obligation. See In Re Crabb, 48 B.R. 165 (Bankr. D. Mass. 1985) (court refused to revive an expired lease because the debtor failed post-petition to give proper notice electing to exercise an option to extend). There is simply no reason to reach a different result simply because the Debtor's default involved an uncured prior breach rather than the failure to give a required notice.

D. The Ninth Circuit's Ruling Has A Broad And Negative Impact On The Commercial Marketplace.

The Ninth Circuit failed to take into account the devastating effects that its decision will have on future commercial transactions. The majority wrote: "Thus no principle of bankruptcy or contract law precludes us from permitting the Debtors here to extend their leases in a manner contrary to the leases' terms, when to do so will effectuate the purposes of section 365." 127 F.3d at 911. This statement imposes no limitation on the types of modifications that can be made to reduce the burden on a debtor wishing to assume an executory contract. Under this analysis, nothing would prevent a bankruptcy court from adjusting the amount of rent, eliminating a notice requirement, or lengthening the

contract term indefinitely. Any modification supposedly furthering reorganization would be justifiable.

Neither §365 nor any other provision of the Bankruptcy Code contemplates that non-debtor parties can be compelled essentially to enter into new agreements on terms for which they did not bargain and over which they had no control. As this Court has stated, "the highest public policy is found in the enforcement of the contract which was actually made." Santa Fe, Prescott, and Phoenix Railway Co. v. Grant Bros. Construction Co., 228 U.S. 177, 188 (1913). Certiorari is warranted in order to address an issue which has a potentially disastrous impact on commercial law.

CONCLUSION

In the past, the United States Supreme Court has granted petitions for review of decisions involving statutory construction or application based upon the significance of the issue in the administration of a statute. See States v. Ruzicka, 329 U.S. 287 (1946). Review has also been granted when the issue under review may impact other facets of society or when the case involves a matter of public interest. See National Boiler Mktg. Ass'n v. United States, 436 U.S. 816, 820 (1978); Rice v. Sioux City Cemetery, 349 U.S. 70, 79 (1955). Such considerations are clearly present in the instant case.

Based on the foregoing, Petitioner respectfully requests that the United States Supreme Court accept its Petition for Writ of Certiorari in order to address the proper interpretation of 11 U.S.C. §365 and that it reverse the Opinion of the Ninth Circuit Court of Appeals in this case.

Carolyn J. Johnsen
Joseph A. Schenk
Counsel of Record
HEBERT, SCHENK & JOHNSEN, P..C.
1440 East Missouri Avenue, Suite 125
Phoenix, AZ 85014
602-248-8203
Attorneys for Petitioner

APPENDIX

Order of the United States Bankruptcy Court for the District of Arizona entered April 6, 1994 ..... 1a

Opinion and Amended Opinion of the United States Bankruptcy Appellate Panel of the Ninth Circuit filed December 11, 1995 and Amended January 8, 1996 ..... 9a

Opinion of the United States Court of Appeals for the Ninth Circuit filed October 22, 1997..... 43a

Bankruptcy Code, Section 365 (11 U.S.C. § 365) 60a

FILED
APR 06 1994
KEVIN E. O'BRIEN CLERK
UNITED STATES
BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES BANKRUPTCY
DISTRICT OF ARIZONA

In re	)	Chapter 11
	)	
THE CIRCLE K	)	Nos. B-90-5052-PHX-GBN
CORPORATION;	)	to B-90-5075-PHX-GBN
CIRCLE K	)	
CONVENIENCE	)	(Jointly Administered)
STORES, INC.;	)	
CIRCLE K	)	
MANAGEMENT	)	
COMPANY; LAR-LIN,	)	
INC.; FIRST CIRCLE	)	
PROPERTIES, INC.;	)	
UTOTEM, INC.;	)	
UTOTEM MARKETS	)	
OF ARIZONA, INC.;	)	
U TOTEM OF	)	
ALABAMA, INC.;	)	
U-TOTE'M OF	)	
COLORADO INC.;	)	
U-TOTE'M OF	)	
MIAMI, INC.; TIC	)	
TOC SYSTEMS,	)	
INC.; MONTERRE	)	
PROPERTIES, INC.;	)	
SHOP & GO, INC.;	)	

CIRCLE K GENERAL, INC.; CIRCLE K HAWAII, INC.; COMBINED AVIATION CO.; CHARTER MARKETING COMPANY (CONNECTICUT); CHARTER MARKETING COMPANY; MR. B'S OIL CO., INC.; MR. B'S FOOD MART INC.; NPI CORPORATION; OLD COLONY PETROLEUM) COMPANY, INC.; NEW ENGLAND PETROLEUM DISTRIBUTORS, INC.; and 44TH STREET & CAMELBACK LIMITED PARTNERSHIP, Debtors.	)	
COLEMAN OIL COMPANY, INC., a New Hampshire corporation, Plaintiff,	)	Adversary no. 91-974-GBN

vs.	)	ORDER
THE CIRCLE K CORPORATION, et al.	)	
Defendants.	)	

This matter is before the Court on debtors' Motion for Summary Judgment (Adversary Docket No. 51).

Upon consideration of the papers filed in this adversary proceeding, including documentary and affidavit testimony as to the chain of name changes, mergers, liquidation of subsidiary into parent corporations and assignments by which debtors New England Petroleum Distributors, Inc. and Old Colony Petroleum, Inc., now known as The Circle K Corporation, claim to be the current assignees and holders of the leasehold interests described in paragraphs 1 and 2 below, and upon consideration of oral argument on March 17, 1994, and of the interests of creditors and the estates, this Court finds and concludes that the debtors New England Petroleum Distributors, Inc. and Old Colony Petroleum, Inc. were the assignees and holders of the leasehold interests and properly exercised their rights as assignees to renew the leases of Stores 2604, 2605, 84802, 84803, 84804, 84805 ("Subject Stores") in 1987 and 1992; the leases have not been nor are they now terminated; there is no genuine issue of material fact and debtors' Motion For Summary Judgment should be granted as a matter of law.

Detailed findings of fact and conclusions of law were made in the Court's ruling from the bench on March 17, 1994,

IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. Pursuant to the confirmed Plan of Reorganization, Old Colony Petroleum Company, Inc. was merged into Circle K Convenience Stores, Inc. on July 23, 1993; on July 26, 1993, The Circle K Corporation merged into Circle K Convenience Stores, Inc.; in connection with that merger Circle K Convenience Stores, Inc. changed its name to The Circle K Corporation. The corporation now known as The Circle K Corporation is the current assignee and holder of the lessee's interest in the leaseholds granted by Coleman Oil, Inc. ("COC") as lessor to Pickering Oil Heat, Inc. as lessee pursuant to documents dated November 21, 1977, in:

Circle K Store No.:	Address:	Description
2604	2975 Lafayette Rd. Portsmouth, NH	Exhibit A hereto incorporated herein
2605	#7 Old Dover Rd. Durham, NH	Exhibit B hereto incorporated herein

2. New England Petroleum Distributors, Inc. is the current assignee and holder of the lessee's interest in the leaseholds granted by Coleman Oil, Inc. as lessor to

Pickering Oil Heat, Inc. as lessee pursuant to documents dated November 21, 1977, in:

Circle K Store No.	Address:	Description:
84802	Rt. 16B Old Rochester Rd. Dover, NH	Exhibit C hereto incorporated herein
84803	Route 125 Epping, NH	Exhibit D hereto incorporated herein
84804	158 Front Street Exeter, NH	Exhibit E hereto incorporated herein
84805	Route 236 Kittery, Maine	Exhibit F hereto incorporated herein

3. Debtors' Motion for Summary Judgment is granted.

4. Plaintiff's objections are overruled and the debtors Fourth, Eighth and Ninth Motions to Assume Real Property Leases, Subleases and Attendant Contracts are hereby granted and approved to the extent the motions seek approval of assumption of the leases to Stores 2604, 2605, 84802, 84803, 84804 and 84805.

5. The only post-petition defaults alleged to exist concern only Store 2605 and total $190.96. Such defaults are de minimis. They cannot result in the avoidance of the

otherwise properly exercised renewals of the leases of the subject stores. Debtors are to retender this amount to plaintiff.

6. Debtors believe they have cured all pre-petition monetary defaults through the confirmed plan and by payment of tax reimbursements to COC. Debtors believe there are no defaults remaining to be cured with respect to the assumption of the leases of Stores 2604, 2605, 84802, 84803 or 84804. If plaintiff believes there remain defaults to be cured with respect to those stores, it shall provide to debtors and the Court a specific list of such defaults within 30 days from the entry of this order, in connection with a motion to require their cure.

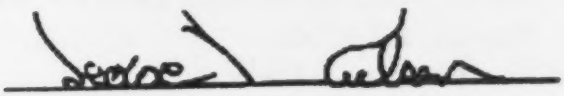
7. The Court shall retain jurisdiction over assumption of the Subject Stores to determine the existence of such defaults as may be specified by COC as provided in this order and their cure. Any pleadings directed to such defaults and their cure for purposes of debtors assumption shall be filed in the bankruptcy proceeding.

8. The adversary will be used by the Court to retain jurisdiction over cure of defaults in connection with assumption of the leases of the Subject Stores by debtors pursuant to 11 U.S.C. S 365(b).

9. This order resolves plaintiff's objection to the form of the order lodged by defendants.

10. The parties will appear for a status hearing, to last no longer than 15 minutes, on May 11, 1994, at 9:15 a.m., in Hearing Room No. 2, Fifth Floor, United States Courthouse, 230 North First Avenue, Phoenix, Arizona.

DATED this 6th day of April, 1994.



George B. Nielsen, Jr.
United States Bankruptcy Judge

Copy mailed the 6th day of April, 1994, to:

Carolyn J. Johnsen
Hebert, Schenk & Johnsen, P.C.
1440 E. Missouri, Suite 125
Phoenix, AZ 85014
Attorneys for Plaintiff

D. J. Baker
Weil, Gotshal & Manges
700 Louisiana, Suite 1600
Houston, TX 77002
Attorneys for Debtors

Harvey R. Miller
Weil, Gotshal & Manges
767 Fifth Avenue
New York, NY 10153
Attorneys for Debtors

John J. Dawson
Streich Lang
100 W. Washington, Suite 2100
Phoenix, AZ 85003
Attorneys for Debtors

Tad R. Smith
Kemp, Smith, Duncan & Hammond
P. 0. Drawer 2800
E1 Paso, TX 79999-2800
Attorneys for Debtors

James L. Rasmussen
Kemp, Smith, Duncan & Hammond, P.C.
P. 0. Box 1276
Albuquerque, NM 87103
Attorneys for Debtors

By:_____
Deputy Clerk

ORDERED PUBLISHED

FILED DEC 11 1995
NANCY B. DICKERSON, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

In re	) BAP No. AZ-94-1422-JMeR
	)
THE CIRCLE K CORPORATION, et al.,	) BK. No. 90-5052-PHX-GBN to 90-5075-PHX-GBN
	)
Debtors.	) Adv. No. 91-974-GBN
	)
COLEMAN OIL COMPANY, INC., a New Hampshire corporation,	) **OPINION**
Appellant,	)
vs.	)
THE CIRCLE K CORPORATION, et al.,	)
Appellees.	)

Argued and Submitted on September 28, 1994
at Phoenix, Arizona

Filed - DEC 11 1995

Appeal from the United States Bankruptcy Court
for the District of Arizona

Honorable George B. Nielsen, Jr.,
Chief Bankruptcy Judge, Presiding

Before: JONES, MEYERS, and RUSSELL, Bankruptcy Judges.
JONES, Bankruptcy Judge:

A lessor leased nine gasoline service stations in New Hampshire and Maine to a lessee. The lease agreement was for ten years but could be renewed for two additional five-year periods. Through a series of mergers, acquisitions, and dissolutions, six of the stations ended up in the Circle K family of convenience stores.

Circle K declared bankruptcy and its subsidiaries gave notice that they intended to renew the leases even though the leases had not been assumed. Instead of moving to force Circle K to assume or reject under S 365(d)(2),[1] the lessor filed an adversary complaint arguing that the leases could not be renewed because (1) Circle K was not a proper assignee; (2) the leases were in default; and (3) the leases had not been assumed. Circle K moved for and was granted summary judgment. The lessor appeals. We **AFFIRM**.

I. FACTS

On November 21, 1977, Coleman Oil Company, Inc.

---

[1]Unless otherwise indicated, all references to Chapters, Sections and Rules are to the Bankruptcy Code, 11 U.S.C. §§ 101, et seq. and to the Federal Rules of Bankruptcy Procedure, Rules 1001, et seq.

("Coleman") and Pickering Oil Heat, Inc. ("Pickering") entered into multiple ten-year lease agreements. The leases covered the following convenience store locations in Maine and New Hampshire: (1) Kittery; (2) Epping; (3) Exeter; (4) Dover; (5) Portsmouth; and (6) Durham. Paragraph 3 of the leases gave Pickering the following renewal rights:

> Lessee shall have two (2) additional and successive terms of five (5) years each on the same terms and conditions as during the original term (except there shall be no extension rights beyond the two contained in this paragraph), by giving Lessor at least six (6) months written notice of such extension prior to the expiration of the original or any extended term as the case may be, provided that Lessee's right to extend is conditioned upon the Lessee not being in default hereunder and is not in default of payments under any of the other leases described on Schedule C attached hereto.

The first option to renew the leases needed to be exercised on or about June 1, 1987. The second option to renew needed to be exercised on or about June 1, 1992.

NPI Corporation ("NPI") acquired Pickering's stock and other assets on December 31, 1983. NPI is the parent company of Debtor New England Petroleum Distributor ("New England") and Debtor Old Colony Petroleum, Inc. ("Old Colony"). New England claims that it is the valid holder of an assignment of the leases on the Kittery, Epping, Exeter, and Dover properties. Old Colony claims assignment of leases on the Portsmouth and Durham locations. NPI merged with

Charter International Oil Company ("Charter") on December 27, 1989. Circle K had previously acquired Charter on May 6, 1988, by purchasing all of its stock. During all of these transitions Coleman received and accepted the bargained for lease payments of $1,250 per month for each location.

On March 9, 1987, New England sent letters to Coleman exercising the option to renew the leases. On May 18, 1987, Old Colony also sent Coleman written notice that it was exercising its option to renew. Coleman did not object to the renewals, and continued to accept rent from both companies for the leased properties.

On May 15, 1989, Coleman informed its counsel that it might have to begin eviction proceedings, due to various defaults under the leases, unless New England and Old Colony could cure their defaults. Circle K, Old Colony, and New England, together with the rest of the Circle K family (collectively referred to as "Debtors"), filed for chapter 11 protection on May 15, 1990. The Debtors requested, and received, several orders during the bankruptcy proceedings granting extensions of time within which to assume or reject unexpired leases of nonresidential real property. See 11 U.S.C. § 365(d)(4) (1994) (requiring assumption of leases of nonresidential real property within 60 days of filing the petition unless an extension is granted by the bankruptcy court).

Coleman filed an adversary proceeding on October 11, 1991, seeking a declaration that Circle K was a tenant-at-will with no right to renew the leases, and also seeking relief from stay to terminate the leases. On March 5 and March 31, 1992, New England and Old Colony sent letters to Coleman exercising the option to renew for the second 5-year period.

The Debtors then moved for summary judgment in the adversary proceeding, asking the court to decide as a matter of law that (1) the Debtors were the legal assignees of the leaseholds and thus entitled to renew the leases; and (2) that the Debtors' renewal of the leases was effective even though the Debtors were in default in contravention of the lease's specific condition precedent. The bankruptcy court granted the motion for summary judgment on April 6, 1994. Coleman appeals.

II. ISSUES

1. Did the bankruptcy court err in holding as a matter of law that the Debtors are proper assignees of the Pickering lease?

2. Did the bankruptcy court err in holding as a matter of law that the Debtors could exercise their option to renew the leases even though the Debtors were in default, in contravention of the lease's specific condition precedent?

III. STANDARD OF REVIEW

We review a grant of summary judgment de novo. E.g., In re Hyman, 123 B.R. 342, 344 (9th Cir. BAP 1991), aff'd, 967 F.2d 1316 (9th Cir. 1992). On motion for summary judgment, the moving party has the burden to show that there are no genuine issues of material fact and therefore they are entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

IV. DISCUSSION

Coleman attacks the grant of summary judgment on

three fronts. First, Coleman argues that there are unresolved factual issues concerning the propriety of the Debtors' lease assignments which preclude a grant of summary judgment. Second, Coleman argues that the assignments are legally invalid under the statute of frauds because the assignments are not evidenced by a writing. Finally, Coleman argues that even assuming that the Debtors are valid assignees or successors, a chapter 11 debtor may not exercise an option to renew a lease unless the debtor first assumes the lease and cures any defaults. We address each of these arguments in turn.

A. Assignment of the Leases.

Coleman argues first that there are factual issues that must be resolved in order to determine whether the Debtors have a legal interest in the leasehold. Coleman points to the somewhat confusing series of mergers and acquisitions, the lack of written assignments to New England and Old Colony, and the lack of notice to Coleman of any purported assignments. The terms of the leases do not support these arguments.

The November 21, 1977 contract between Coleman and Pickering provides as follows:

> 11. Lessee shall have the right and privilege to assign this Lease or sublet said Premises in whole or in part, any extension thereof, upon such terms as to it shall seem best, PROVIDED, HOWEVER, that in the event of an assignment or sublet the Lessee shall remain primarily liable on said Lease.
>
> . . . .

> 22. The word "Lessor" herein shall be construed to include the said Lessor and Lessor's heirs, representatives, successors and assigns, as the case may be, and "Lessee" herein shall be construed to include the said Lessee, its successors and assigns.

The bankruptcy court interpreted this language as follows:

> The lease agreement itself specifically notes that the Lease is binding upon the parties and their successors and assigns. . . . The term Lessee itself is specifically construed to include successors and assigns.

The bankruptcy court found nothing in the contract to indicate that a formal assignment was required before a related entity could exercise the right to renew. The court also found nothing in the contract to indicate that Coleman required notice of assignments. The only requirement was that the original lessee, Pickering, would remain primarily liable under the lease. Finally, applicable Massachusetts law states that the surviving corporation of a merger or a consolidated corporation is vested with all right, title and interest in "all of the property, real, personal, or mixed" of the original corporation. Mass. Gen. L. Ch. 516 §§ 46(a)(4), (b), and (c) (1991).[2]

Having moved for summary judgment, the initial burden of showing an absence of any issues of material fact

---

[2]Massachusetts is the state of incorporation of Old Colony, New England, NP Corp., NPI, and Pickering.

was upon the Debtors. We feel that the Debtors met their burden. The Debtors provided affidavits and documents concerning the numerous mergers, acquisitions and dissolutions. The bankruptcy court made the following conclusions:

> So in short, with respect to the Portsmouth and Durham stores, the chain of ownership of lessee's interest is as follows: Pickering to Pickering Old Colony, Inc., to Northeast Petroleum Corporation, to Old Colony Petroleum Company. With respect to the Epping, Exeter, Kittery and Dover stores, the chain of ownership in the lessee's interest is as follows: Pickering to Pickering Old Colony, Inc., to Northeast Petroleum Corporation, to New England Petroleum Distributors, Inc.

We agree with the bankruptcy court's conclusion that the documents presented by Debtors showed a chain of transfer of the subject leases.

Pursuant to Celotex, once the moving party has met its burden, the opposing party then has the burden to come forward with a more convincing showing that summary judgment is not appropriate. Celotex, 477 U.S. at 324. Coleman argues that the chain of assignment is too confusing to follow. Coleman also argues that there are holes in the paper trail presented by Debtors, and that Debtors' later behavior was inconsistent with the notion of an earlier assignment.

Coleman does not successfully argue that the chain of assignment is deficient as a matter of fact or that the contract

between Coleman and Pickering required documentation of assignments. Therefore, Coleman has failed to meet its burden pursuant to Celotex. We agree with the bankruptcy court's conclusion that no formal assignment of the leases or notice to the landlord was contemplated or required by the lease terms. Therefore, we affirm the bankruptcy court's decision that the Debtors were proper assignees of the lease, and therefore had the right to exercise the renewal option.

B. ***Applicability of the Statute of Frauds***

Coleman next attempts to raise a statute of frauds defense. It argues that a leasehold interest is subject to the statute of frauds and therefore the lease assignments at issue are invalid because they are not evidenced by a writing.

The bankruptcy court ruled that the statute of frauds was inapplicable because Coleman was not a party to the assignments. It concluded that third parties cannot assert the statute of frauds as a defense to an action by the direct parties to a contract because the statute of frauds is a shield, not a sword. Because the statute is intended to prevent fraud by one of the contracting parties on the other, if those parties recognize the contract, the protection afforded by the statute is unnecessary. Chapman v. Ford, 227 A.2d 26, 31 (Md. 1967)); see also Restatement (Second) of Contracts § 144 (1981) (stating that only a party to a contract or a transferee or successor of a party to the contract can assert that the contract is unenforceable under the statute of frauds).

We agree with this conclusion and therefore affirm the bankruptcy court's ruling that the statute of frauds is inapplicable in this case.

C. *Exercise of the Renewal Option in Bankruptcy*

Coleman next argues that the Debtors' attempt to exercise the renewal right for the final five-year option must fail because the Debtors were in default at the time they attempted to exercise the option to renew.[3] Coleman argues that the Debtors would have had to assume the lease and cure the defaults before they could exercise the right to renew. Since the Debtors failed to cure the defaults and assume the lease before the option period ran, the leases expired and there is nothing for the Debtors to now assume.

The heart of Coleman's argument against the Debtors' assumption of the leases lies in the conflict that often occurs between bankruptcy law and state law contract rights. Under paragraph 3 of the leases, a lessee could not exercise the option to renew a lease for another five-year period if the lessee was in default on the lease payments. At the time the Debtors attempted to exercise the option to renew, they were in default on the leases. It is therefore arguable that outside of bankruptcy, Coleman might have refused to accept the renewal unless the Debtors cured the minor defaults.[4]

---

[3]The Debtors had defaulted both pre- and postpetition. While the exact amount and nature of the alleged defaults is unclear, the bankruptcy court characterized them as de minimis. The prepetition defaults apparently involved the failure by the Debtors to maintain the Kittery property in good repair and to pay property taxes in the amount of $4,470 on the Durham and Portsmouth stores. All postpetition property taxes were paid before Circle K exercised the options to renew, and the bankruptcy court stated that the amount of postpetition defaults existing at the time of renewal were alleged to be less than $200.

[4]It is by no means certain that outside of bankruptcy Coleman could have refused to accept the Debtor's attempt to exercise their option to renew. As the dissent points out, state anti-forfeiture law may have

The dissent argues that the same result should occur in bankruptcy; i.e., that the Debtors should be required to cure all pre- and postpetition defaults, no matter how small, in the time specified within the leases in order to exercise their option to renew. We disagree, and for the reasons discussed below hold that a debtor who is a lessee under a lease which conditions renewal upon not being in default may exercise its option to renew without first curing the default or assuming the lease.

1. Section 365(d)

The current version of § 365(d)(2) states that in a case under chapter 11, a trustee may assume or reject an unexpired lease of residential real property at any time before confirmation of the plan, unless the landlord asks for, and receives, a court order forcing the trustee to assume or reject the lease within a specified period. 11 U.S.C. § 365(d)(2) (1994). Section 365(d)(4) states that a trustee must assume an unexpired lease of nonresidential real property within 60 days of filing the petition, unless the trustee asks for a longer period of time. 11 U.S.C. § 365(d)(4) (1994).

Prior to the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("BAFJA"), however, § 365 did not create a distinction between residential and nonresidential leases of real property.[5] In both cases a chapter 11 debtor in

---

prevented Coleman from refusing to allow Circle K to renew the leases due to the de minimis nature of the defaults.

[5]BAFJA amended § 365(d) by adding § 365(d)(2), which required assumption or rejection of an unexpired lease of nonresidential real property within 60 days after the order for relief. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 362, 98 Stat. 333, 361 (1984); 2 Lawrence P. King, Collier on Bankruptcy, ¶ 365.03 at 365-24 n.1 (15th ed. 1995).

possession had until plan confirmation to decide whether to accept or reject an unexpired lease of real property, subject only to the landlord's right to ask the bankruptcy court to shorten that period. In pre-BAFJA decisions, therefore, landlords often brought motions to have the assumption/rejection period shortened. Some of these decisions involved situations similar to the instant appeal--an attempt by a debtor to exercise a option to renew an unexpired lease before actually assuming the lease and curing any defaults. Because the landlord had to come into court in order to shorten the assumption/rejection period, these decisions created a rule that turned on whether or not the landlord had asserted that "right."

This rule was first enunciated in In re Webster Clothes, Inc., 36 B.R. 260 (Bankr. D. Md. 1984). In Webster, the bankruptcy court allowed a debtor to exercise his option to renew an unexpired lease even though the debtor had defaulted prepetition. The court based its holding on various factors, including a statement that "[h]aving failed to avail itself of the statutory procedure for securing an earlier assumption or rejection of the lease, [the landlord] will not be heard to complain that [the debtor] had not assumed the lease at the time it exercised the Option."[6] Id. at 264.

The rule was also applied in In re Cook United Inc., 53 B.R. 342 (Bankr. N.D. Ohio 1985). In Cook United, the landlord had requested, and received, a court order forcing the debtor to assume or reject the unexpired lease within 60 days. For that reason the court held that the debtor could not renew

---

[6]The other determining factors were that (1) section 365 governed the cure of defaults in unexpired leases; (2) the prepetition defaults were minor; and (3) the landlord had demonstrated no compensable, pecuniary loss resulting from the debtor's default. Webster, 36 B.R. at 264.

the lease unless it first assumed the lease and cured all defaults. Id. at 345. The court's opinion, however, clearly indicates that until a landlord files a motion asking the court to force the debtor to assume or reject the leases, "the federal policy to allow the debtor time to decide whether or not it will promptly cure a default outweighs state law contract provisions to the contrary." Id.

A similar situation also arose in In re Revco D.S., Inc., 111 B.R. 626 (Bankr. N.D. Ohio 1989). Although Revco arose after the BAFJA amendments, the debtor requested, and received, an order extending the period for assuming the lease until plan confirmation. Applying the Webster analysis, the court held that the debtor could "exercise its right to renew the Lease without assuming the Lease and curing the prepetition [default]," id. at 630, because the landlord had not "requested the Court to order debtor to assume or reject within a specified period of time." Id. at 629.

We agree with the reasoning of the above cases. However, given the current version of § 365 which places the burden on the debtor to seek an extension of time within which to assume or reject an unexpired lease of nonresidential property, we decline to base our decision on whether or not the landlord has sought a court order compelling the debtor to assume or reject within a specified time. Instead, we hold simply that a debtor who has defaulted prepetition on an unexpired lease may exercise its option to renew that lease without first assuming the lease or curing any prepetition defaults. Of course, such exercise must be conditioned upon the eventual assumption of the lease within the applicable time period and cure of all defaults in compliance with the requirements of § 365(b)(1).

The policy behind the Bankruptcy Code supports such a rule of law. The purpose behind S 365 is to balance the state law contract right of the creditor to receive the benefit of his bargain with the federal law equitable right of the debtor to have an opportunity to reorganize. See Webster, 36 B.R. at 263. This is accomplished by forcing the debtor to abide by the contract provisions during pendency of the bankruptcy and cure any prepetition defaults upon assumption while prohibiting the creditor from enforcing any prepetition default remedies. 11 U.S.C. §§ 365(b)(1), 365(d)(3), 362(a)(3) (1994). This balance, we believe, allows a debtor to exercise an option to renew an unexpired lease without first curing any prepetition defaults.[7] Coleman will receive the benefit of its bargain when, on assumption of the leases, Debtors are required to cure all pre- and postpetition defaults.

The dissent initially states that no other court has ever stated the rule of law which we adopt in this decision. However, as the above discussion demonstrates, our decision is supported by Revco, Cook, and Webster. The dissent disagrees with the holdings of these cases by concluding that they "represent judges 'legislating' a result" with no statutory authority. We decline to accept that characterization of these holdings, preferring to instead to view them as proper exercise of a bankruptcy court's authority to interpret the Bankruptcy Code in situations where the Code does not clearly resolve an issue.

---

[7] As previously cited cases have illustrated, the lessor may prevent this occurrence by moving the bankruptcy court to force the debtor to assume or reject the unexpired lease before the option period expires.

The dissent quotes one statement from Cook United for what it believes is the correct view of this issue--that a bankruptcy court "has no authority to modify or nullify contractual provisions." Cook United, 53 B.R. at 345. However, the bankruptcy court in Cook United cited In the Matter of Schokbeton Indus. Inc., 466 F.2d 171 5th Cir. 1972), as authority for this proposition. As the following discussion indicates, the reasoning behind Schokbeton is clearly inapplicable.

Schokbeton was a case decided during an "arrangement proceeding" under Chapter XI of the Bankruptcy Act and which concerned the termination of a franchise agreement. There was no automatic stay in Chapter XI arrangement proceedings; instead, § 314 gave the court discretion to enjoin or stay the commencement or continuation of any suits against property of the debtor and to enjoin or stay any act to enforce any lien against property of the debtor. Bankruptcy Act of 1898, 30 Stat. 544 (1898) (as amended by the Chandler Act, Pub. L. No. 75-696, S 314, 52 Stat. 840, 907 (1938)), repealed by Bankruptcy Reform Act of 1978, Pub. L. No. 98598, § 401, 92 Stat. 2549, 2682 (1978). In Schokbeton, the franchise agreement provided for a 60-day grace period to cure any default in royalty payments. The franchisee did default and the franchisor notified him that he had 60 days in which to cure. Before the expiration of the 60 days, the franchisee filed a petition under Chapter XI of the Bankruptcy Act. Notwithstanding the bankruptcy filing, the franchisor terminated the franchise after the 60 days expired. The franchisee then petitioned the bankruptcy referee to enjoin the franchisor from granting the exclusive franchise to another licensee. Schokbeton, 466 F.2d at 173-74. After the referee granted the injunction, the franchisor appealed.

The Fifth Circuit reversed, holding that under the Bankruptcy Act "a contractual termination provision is unaffected by the filing of a petition in bankruptcy and may be enforced against the trustee or debtor in possession." Id. at 176. The court also noted that under the Bankruptcy Act a contract or lease provision which stated that filing a bankruptcy petition automatically terminated the lease was valid and could not be enjoined by a bankruptcy referee. Id. This decision, and the rationale behind it, is clearly not applicable under the Bankruptcy Code. Cook United, 53 B.R. at 345; 11 U.S.C. § 365(e)(1)(B) (1994) (preventing enforcement of any clause in an executory contract or unexpired lease which purports t terminate the agreement if one party files for bankruptcy).

We are also concerned with the leverage landlords would receive if debtors were forced to cure prepetition defaults before deciding whether or not to assume a lease. Bankruptcy Code § 365(b)(1) requires a debtor to cure or provide adequate assurances that it will promptly cure prepetition defaults at the time it assumes or rejects a contract. 11 U.S.C. § 365(b)(1) (1994). If a debtor does not assume a contract or unexpired lease, the existing default becomes an unsecured claim and is paid with no more priority than any other unsecured creditor enjoys under the Code. E.g., In re Pacific Express Inc., 780 F.2d 1482, 1486 (9th Cir. 1986). A debtor in possession can assume or reject an executory contract or unexpired lease of residential real property at any time before plan confirmation. 11 U.S.C. S 365(d)(2) (1994). Although an unexpired lease of nonresidential real property must be assumed or rejected within 60 days of filing the petition, 11 U.S.C. § 365(d)(4) (1994), debtors are often granted extensions of time well beyond this 60-day period.

Under the dissent's rationale, a lessor could force a debtor to cure prepetition defaults in order to preserve its right to exercise a renewal option. If the lease is ultimately rejected, however, the prepetition default would have been a general unsecured claim. In effect, the lessor is given leverage to squeeze a preference out of the debtor. We do not feel this result is in line with the policy behind the Bankruptcy Code in general or behind § 365 specifically.

The dissent disagrees with this analysis, stating that the lessor's exercise of its "lawfully bargained for rights" in this situation is not unfair "leverage," but merely enforcement of its contract rights. The dissent characterizes our holding as a "balancing act [which] is an improper taking of the lessor's bargained for contractual rights." This view is at odds with both the plain language and purposes of the Bankruptcy Code, which in various ways nullifies, modifies or stays creditors' lawfully bargained for contract rights. E.g., 11 U.S.C. §§ 362, 365, 522(f), 524, 544, 545 (1994). If the dissent's theory were correct, then any landlord could defeat § 365 by inserting a lease provision that requires a complete cure of any defaults before exercising an option in the lease. Surely the Bankruptcy Code was not intended to allow such circumvention. E.g., 365(e)(1)(B) (1994).

2. Section 108

The dissent fails to cite a single case in support of its position that a debtor must cure all prepetition defaults before exercising an option to renew which is conditioned upon the debtor not being in default. Instead, the dissent points to § 108(b). Section 108(b) states that if state law or an agreement fixes a certain period in which the debtor may cure any defaults, and the default period has not yet expired at the time

of filing bankruptcy, the debtor has until the later of the end of the period contained in the agreement or 60 days after the bankruptcy petition is filed.

We disagree with this analysis, finding more persuasive the reasoning behind the decision in Moody v. Amoco Oil Co., 734 F.2d 1200 (7th Cir.), cert. denied, 469 U.S. 982 (1984). [8] In Moody, a jobbership contract between the debtor and a creditor provided for a fifteen day cure period after a default. The debtor defaulted, then filed bankruptcy before expiration of the fifteen day cure period. The creditor, referring to § 108(b), argued that the debtor had to cure its default within 60 days or the jobbership contract would terminate. The court disagreed, holding that "section 108(b) does not apply to curing defaults in executory contracts" because "[s]ection 365 specifically governs. . . ." Id. at 1215; accord, In re McCallen, 49 B.R. 948, 952 (Bankr. D. Or. 1985).[9]

The dissent argues that the rationale behind Moody is not applicable to the instant appeal, because "[a]lthough § 365

---

[8] Although the Moody decision specifically concerned executory contracts, its reasoning is just as applicable to unexpired leases.

[9] Moody, the Seventh Circuit distinguished the case of Johnson v. First Nat'l Bank of Montevideo, 719 F.2d 270 (8th Cir. 1983), cert. denied, 465 U.S. 1012 (1984), which held that § 108(b), rather than § 362, governed the expiration of a statutory period of redemption of a mortgage. The court in Moody explained that § 362 does not specifically apply to redemption periods and therefore there was no direct conflict between those two provisions. However, there is a direct conflict between § 108(b) and S 365 as applied to executory contracts (and unexpired leases), and therefore these two sections "should not [be] appl[ied] . . . so as to cause irreconcilable conflict. . . ." Moody, 734 F.2d at 1215 n.15.

may extend the time for curing defaults until assumption of the lease, it does not eliminate the contractual necessity of not being in default when attempting to exercise the options to extend the leases." However, the dissent fails to cite any statutory or case authority for this distinction. We think the policy considerations outlined in Moody are applicable in the instant appeal:

> This holding is consistent with the policies underlying the different provisions and the Code in general. The purpose behind section 108(b) is to permit the debtor an extension of time for doing certain acts necessary to preserve his rights. It would be anomalous to apply it to restrict debtor's rights . . . . Applying section 108(b) here would force debtors to decide whether to cure long before they must decide whether to assume or reject the contract and long before they know whether any reorganization plan will be confirmed. Finally, the purpose behind chapter 11 is "to permit successful rehabilitation of debtors" and "to prevent a debtor from going into liquidation." Debtors must be permitted a certain amount of flexibility in determining whether to assume or to reject a contract. Specific provisions of the Code should be interpreted with this goal in mind. To interpret the Code so as to minimize flexibility and rush the debtor into what may be an improvident decision does not further the purposes of the reorganization provisions.

Moody, 734 F.2d at 1216 (citation omitted).

D. Alternative State law Theory

Responding to Coleman's argument that the leases had terminated prepetition due to the invalidity of the lease assignments, the bankruptcy court supported its grant of summary judgment by applying the Ninth Circuit opinion in In re Waterkist Corp., 775 F.2d 1089, 1091 (9th Cir. 1985). Waterkist presents a two-part analysis, first asking whether the lease-was terminated prepetition pursuant to the contract under applicable state law and, if so, asking whether the termination would have been reversed under state anti-forfeiture provisions. We decline to address this issue, however, because the Waterkist analysis requires the balancing of equities between lessor and lessee in order to decide whether state anti-forfeiture provisions would prevent termination of a lease. This determination requires findings of fact inappropriate on a motion for summary judgment.

V. CONCLUSION

Coleman challenges the chain of assignment between Pickering and Debtors, but fails to meet its burden under Celotex. Having failed to raise material issues of fact, Coleman raises the statute of frauds as an issue of law. However, Coleman lacks standing to raise this legal argument because it was not a party to the assignment contract. Finally, § 365(d) permits a debtor to exercise an option to renew an unexpired lease prior to assumption and cure. Accordingly, the order granting summary judgment is **AFFIRMED**.

RUSSELL, Bankruptcy Judge, dissenting:

I respectfully dissent.

Although I agree with the majority that the debtors in possession are proper assignees of the leases, I cannot agree that the leases were properly assumed. I agree with Coleman's argument that the attempt by the debtors in possession to exercise the extension rights for the final five-year option must fail because the debtors in possession were in default both pre- and postpetition.

The issue before us is not whether the debtors in possession can exercise their options to renew the six leases without assuming the leases and curing the defaults. [10] Rather, the issue before us is whether the options could have been exercised without first curing the defaults. If not, then there were no leases for the debtors in possession to later assume.

Paragraph 3 of the leases provides that the lessee could exercise the extension rights:

> [B]y giving Lessor at least six (6) months written notice of such extension prior to the expiration of the original or any extended term as the case may be, Provided that Lessee's right to extend is conditioned upon the Lessee not being in default hereunder and is not in default of payments under any of the other leases described on Schedule C attached hereto. (Emphasis added.)

The debtors in possession filed their bankruptcy cases on May 15, 1990. Under the leases, the first extension of the

---

[10] However, if this were the issue, I would hold that in order to exercise their options to extend the six leases, the debtors in possession must assume the leases and perforce cure the defaults.

leases would have expired on November 20, 1992, unless the written notices to renew were given by May 20, 1992. Although the written notices were sent, the leases were in default at that time.

I know of no provision in the Bankruptcy Code which gives a debtor in possession the right to exercise an option without also curing any default as required by the very contract which gives the lessee the right to exercise the option. Although the majority argues that § 365 abrogates an important right of the lessor in the lease, i.e., the right to have all defaults cured when the option is exercised, they point to no specific part of § 365 to achieve this result.

There is nothing in § 365 that extends the time to exercise the option and the fulfillment of any conditions precedent, such as not being in default, at the time of the purported exercise. Since the time to exercise the options expired, the leases were terminated.

It is clear that the notice required to exercise the option was not extended pursuant to§ 108(b). [11] Therefore, pursuant

---

[11] Section 108(b) provides:

> (b) Except as provided in subsection (a) of this section, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor or an individual protected under section 1201 or 1301 of this title may file any pleading, demand, notice, or proof of claim or loss, cure a default, or perform any other similar act, and such period has not expired before the date of the filing of the petition, the trustee may only file, cure, or perform, as the case may be, before the later of -

to ¶3 of the leases, the debtors in possession were required to timely exercise the options. Indeed, the debtors in possession recognized the need to timely exercise the options by attempting to do so. However, a condition precedent for the right to exercise the options was not being in default on the leases. Since the defaults were not cured, there was no timely exercise of the options. Thus, the leases were terminated.

The majority states its holding as follows:

> We disagree [with the dissent] and for the reasons discussed below hold that a debtor who is a lessee under a lease which conditions renewal upon not being in default may exercise its option to renew without first curing the default or assuming the lease.

Unfortunately for the majority, no other court, at least none of those cited by the majority, has ever stated such a rule of law.

The majority relies on a number of bankruptcy court decisions, mainly, In re Revco D.S., Inc., 111 B.R. 626 (Bankr. N.D. Ohio 1989), In re Webster Clothes, Inc., 36 B.R. 260 (Bankr. D. Md. 1984), In re Cook United, Inc., 53 B.R. 342 (Bankr. N.D. Ohio ,985) and In re Tirenational Corp., 4i B.R. 647 (Bankr. N.D. Ohio 1985).

---

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) 60 days after the order for relief. 11 U.S.C. § 108(b) (emphasis added).

Upon close scrutiny, those cases represent judges "legislating" a result with no basis under § 365, in order to achieve a result which those courts felt would better serve some bankruptcy purpose. As the majority states: "This policy also balances the contract rights of the landlord, while protecting the debtor's rights to the § 365 period under which to decide whether to assume or reject the lease." In my opinion, the balancing act is an improper taking of the lessor's bargained for contractual rights.

The majority first notes that they "are concerned with the dissent's position would give to landlords". The then disagrees with my dissent as follows:

> Under the dissent's rationale, a lessor could force a debtor to cure prepetition defaults in order to preserve its rights to exercise a renewal option. If the lease is ultimately rejected, however, the prepetition default would have been a general unsecured claim. In effect, the lessor is given leverage to squeeze a preference out of the debtor. We do not feel this result is in line with the policy behind the Bankruptcy Code in general or behind § 365 specifically.

The majority has a very interesting way of looking at a lessor's contractual rights in a pejorative sense of giving "the lessor leverage to squeeze a preference out of the debtor". I suppose it is possible for a court to look at any party's exercise of its lawfully bargained for rights against a debtor in possession as unfair "leverage." However, I choose not to view parties' rights in this light.

Indeed, the court in Cook United, supra, stated what I believe is the law:

> Debtor is requesting this Court to rewrite the leases and Section 365 of the Bankruptcy Code, by holding that even though it was in default, Debtor had a right to exercise its option to renew the leases prior to its assuming said leases and curing the defaults. This Court cannot do so. The bankruptcy court has no authority to modify or nullify contractual provisions. Matter of Schokbeton Indus., Inc., 466 F.2d 171 (5th Cir. 1972).

53 B.R. at 345 (emphasis added).

Moody v. Amoco Oil Co., 734 F.2d 1200 (7th Cir.), *cert denied*, 469 U.S. 982 (1984), offers no support for the majority's holding. In relevant part, Moody merely stands for the proposition that § 108 does not generally apply to curing defaults in executory contracts, but that such time limit is governed by § 365.

Moody is of no assistance to the majority's reasoning because the time limit that is in question in the case before us is the period of time in which to timely exercise an option. Although § 365 may extend the time for curing defaults until assumption of the lease, it does not eliminate the contractual necessity of not being in default when attempting to exercise the options to extend the leases.

The facts in Revco were very similar to those in the case before us. While in default, the debtor in possession notified the lessor, postpetition, that it was exercising its

option to extend the lease. The court held that the debtor in possession could properly exercise the option to extend the lease, without assuming the lease and curing the default, because the lessor failed to request the court to order the debtor in possession to assume or reject the lease. Without any independent analysis, the court based its holding on the following cases: Cook United, supra; Tirenational, supra; and Webster, supra.

In Cook United, the court held that the option to extend the leases could not be exercised without the debtor in possession first assuming the leases and curing the defaults. Approximately one month prior to the date on which the debtor in possession was required to exercise the option under the leases, the lessor filed an application to require the debtor in possession to assume or reject the leases. The debtor in possession failed to assume or reject the leases prior to the expiration of the leases.

The holding of Cook United which is relevant to the matter before us was stated as follows:

> Once a request is made by the lessor to assume or reject, federal policy no longer overrides the contract, and the lease terms retain their original effect. Thus once Glimcher filed for an order to assume or reject, Debtor had to assume and cure all defaults before it could exercise the option to renew. This is especially so where the lease provision in question is an option to renew. Such provisions are designed to provide the lessor with enough time to find a new tenant if the lease is not renewed. To allow Debtor to exercise the option without assuming

> the lease would be a substantial interference with the contractual rights of the lessor, because he would not know if the lessee intended to remain, the very thing for which he bargained. Where the lessor has requested assumption or rejection, Debtor must assume before it may exercise an option to renew. In order for Debtor to reap the benefits of a contract, it must at the same time bear the burdens of that contract. In re Tirenational Corp., 47 B.R. 647 (Bankr. N.D. Ohio 1985).

53 B.R. at 345.

My only disagreement with the above statement by the court in Cook United is that I see no requirement in either bankruptcy or non-bankruptcy law that the lessor must first apply to the bankruptcy court to order the debtor in possession to assume or reject the lease before being entitled to the contractual benefits of the lease which the Cook United court stated it ". . . has no authority to modify or nullify. . . ." Id.

The only case authority cited by the court in Cook United for the purported rule of law is Tirenational, supra, which does not support this conclusion and which offers no support for the majority's position.

Tirenational involved two separate chapter 11 cases in which the debtor in possession in the first case was the franchisor and the debtor in possession in the second case was the franchisee. After the filing of the franchisor's case, but before the filing of the franchisee's case, the franchisee was in substantial default on its payments. Therefore, the franchisor notified the franchisee that the franchise agreement was

terminated.

The issue before the court was whether the franchisor could exercise its termination rights without first assuming the franchise agreement. If it could, then the agreement was terminated prior to the franchisee's filing its chapter 11 case and consequently would not be property of the franchisee's bankruptcy estate.

The court correctly held that until the agreement was assumed or rejected, it remained in effect and the franchisor/debtor in possession could exercise its termination rights against the franchisee. The case did not involve the exercise of an option to extend and did not involve any purported requirement that a lessor file a motion requiring a lessee to assume or reject the lease before the lessor could exercise its contractual rights.

Therefore, Tirenational is not relevant to the question before us, i.e., whether a debtor in possession can exercise an option in violation of the express terms of the lease requiring the lessee not to be in default at the time the option is exercised.

In Webster, supra, the debtor in possession filed an application for authority to assume an unexpired lease for retail premises located in a shopping center, including a five-year extension period provided in the lease.

The debtor in possession timely notified the lessor of its intention to extend the lease. The lessor refused to accept the extension because the debtor was in default and had not assumed the lease. As in the case before us, the lease provided that to extend the lease for a five-year period, it must not be in

default. The court held that the attempted extension was effective, the lease had not terminated under its own terms and the lease could be assumed.

The court then announced its ruling as follows:

> Having failed to avail itself of the statutory procedure [under § 365(d)(4)] for securing an earlier assumption or rejection of the lease, Forbes-Cohen [lessor] will not be heard to complain that Webster [debtor in possession] had not assumed the lease at the time it exercised the Option.

36 B.R. at 264.

Apparently, not completely satisfied with its newly announced rule, the court went on to note that the default was "minor." The court then concluded:

> As a court of equity, this Court is loathe to enforce a forfeiture of the Option on the basis of a minor default. Webster's effective exercise of the Option deprives Forbes-Cohen only of the chance to relet the Premises to another tenant at a higher rent, a windfall. To hold that Webster has not exercised the Option would be to deprive the estate of a valuable asset and frustrate the cure provisions of Section 365.

Id. (citation omitted).

Although there is no authority for the court under federal law to excuse even a "minor" default, there may very

well have been state anti-forfeiture laws which would allow the court to avoid a forfeiture. Indeed, as discussed below, I would reverse and remand the case before us for the bankruptcy court to make such a determination under state anti-forfeiture law.

It is clear from the record, as the majority concedes, that there were both pre- and postpetition defaults under the leases. The majority also concedes that the determination and the amount of the defaults was not appropriate on a motion for summary judgment.

Under state anti-forfeiture law, however, it may be possible for the debtors in possession to avoid the termination of the leases. Therefore, this matter should be reversed and remanded to the bankruptcy court in order to provide the debtors in possession the opportunity to have the bankruptcy court consider reviving the leases under state anti-forfeiture law.

CONCLUSION

The failure of the debtors in possession to cure all defaults at the time of their attempted exercise of the options, in violation of the specific requirement in the leases, resulted in the leases being terminated for failure to timely exercise the options. Nevertheless, it may be possible for the debtors in possession to revive the leases pursuant to state antiforfeiture law.

I would therefore REVERSE the bankruptcy court's granting of the motion for summary judgment by the debtors in possession, and REMAND the matter for the bankruptcy court to consider the possible revival of the leases under state anti-forfeiture law.

ORDERED PUBLISHED

FILED
Jan - 8 1996
Nancy B. Dickerson, Clerk
L.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re	) BAP No. AZ-94-1422-JMeR
	)
THE CIRCLE K	) BK. No. 90-5052-PHX-GBN
CORPORATION, et al.,	) to 90-5075-PHX-GBN
	)
Debtors.	) Adv. No. 91-974-GBN
	)
COLEMAN OIL	) **AMENDED**
COMPANY, INC.,	) **OPINION**
a New Hampshire	)
corporation,	)
Appellant.	)
vs.	)
	)
THE CIRCLE K	)
CORPORATION, et al.,	)
	)
Appellees.	)

Argued and Submitted on September 28, 1994
at Phoenix, Arizona

Opinion Filed - December 11, 1995
Amended Opinion Filed JAN - 8 1996

Appeal from the United States Bankruptcy Court
for the District of Arizona

Honorable George B. Nielsen, Jr.,
Chief Bankruptcy Judge, Presiding

Before: JONES, MEYERS, and RUSSELL, Bankruptcy Judges.

The dissent argues that the rationale behind Moody is not applicable to the instant appeal, because [a]lthough § 365 may extend the time for curing defaults until assumption of the lease, it does not eliminate the contractual necessity of not being in default when attempting to exercise the options to extend the leases. However, the dissent fails to cite any statutory or case authority for this distinction. We think the policy considerations outlined in Moody are applicable in the instant appeal:

> This holding is consistent with the policies underlying the different provisions and the Code in general. The purpose behind section 108(b) is to permit the debtor an extension of time for doing certain acts necessary to preserve his rights. It would be anomalous to apply it to restrict debtor's rights . . . . Applying section 108(b) here would force debtors to decide whether to cure long before they must decide whether to assume or reject the contract and long before they know whether any reorganization plan will be confirmed. Finally, the purpose behind

> chapter 11 is "to permit successful rehabilitation of debtors" and "to prevent a debtor from going into liquidation.. Debtors must be permitted a certain amount of flexibility in determining whether to assume or to reject a contract. Specific provisions of the Code should be interpreted with this goal in mind. To interpret the Code so a" to minimize flexibility and rush the debtor into what may be an improvident decision does not further the purposes of the reorganization provisions.

Moody, 734 F.2d at 1216 (citation omitted).

D. Alternative State law Theory

As discussed above, the bankruptcy court rejected Coleman's argument that the leases had automatically terminated pre- or postpetition because the Debtors were in default at the time they exercised the options to renew. The bankruptcy court then stated that even if it held that the leases had terminated, state antiforfeiture law would allow the debtors to reinstate the leases. The bankruptcy court cited In re Waterkist Corp., 775 F.2d 1089 (9th Cir. 1985), as support. Waterkist presents a two-part analysis for determining whether a debtor can reverse the prepetition termination of a lease and thereafter assume the lease in bankruptcy; Under the Waterkist analysis, a court first determines whether the lease was terminated prepetition pursuant to the contract under applicable state law and, if so, whether the termination would have been reversed under state anti-forfeiture provisions. The bankruptcy court

indicated that under this analysis, the Debtors would probably be entitled to assume the leases even if they had terminated. We decline to address the propriety of this fact-intensive analysis, however, because we have already affirmed the bankruptcy court's decision for the reasons expressed in Part IV, subsection C above.

V. CONCLUSION

Coleman challenges the chain of assignment between Pickering and Debtors, but fails to meet its burden under Celotex. Having failed to raise material issues of fact, Coleman raises the statute of frauds as an issue of law. However, Coleman lacks standing to raise this legal argument because it was not a party to the assignment contract. Finally, § 365(d) permits a debtor to exercise an option to renew an unexpired lease prior to assumption and cure. Accordingly' the order granting summary judgment is **AFFIRMED**.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: THE CIRCLE K CORPORATION; Circle K Convenience Stores, Inc.; Circle K. Management Company; Lar-Lin, Inc.; First Circle Properties, Inc.; Utotem, Inc.; Utotem Markets of Arizona, Inc.; U Totem of Alabama Inc.; U-Tote'M of Colorado Inc.; U-Tote-M of Miami, Inc.; Tic Toc Systems, Inc.; Monterre Properties Inc.; Shop & Go, Inc.; Circle K General, Inc.; Circle K Hawaii, Inc.; Combined Aviation Co.; Charter Marketing Company (Connecticut); Mr. B's Oil Co., Inc.; Mr. B's Food Mart, Inc.; NPI Corporation; Old Colony Petroleum Company, Inc.; New England Petroleum Distributors, Inc.; and 44th Street & Camelback Limited Partnership,

Debtors.

COLEMAN OIL COMPANY, INC.,

Appellant,

v.

THE CIRCLE K CORPORATION,

Appellee.

No. 96-15200

BAP No.
AZ 94-01422-JmeR

OPINION

Appeal from the Ninth Circuit
Bankruptcy Appellate Panel
Jones, Myers and Russell, Judges, Presiding

Argued and Submitted
March 10, 1997—San Francisco, California

Filed October 22, 1997

Before: Byron R. White,* Associate Justice, Retired,
William C. Canby and Pamela Ann Rymer, Circuit Judges.

Opinion by Judge Canby; Partial Concurrence and
Partial Dissent by Judge Rymer

SUMMARY

Bankruptcy/Real Estate

The court of appeals affirmed a judgment of the bankruptcy appellate panel (BAP). The court held that a lease provision barring the exercise of a renewal option by a lessee in default does not preclude a defaulting Chapter 11 bankruptcy debtor from doing so.

Appellant Coleman Oil Company leased gasoline stations to Pickering Oil Heat for ten years with options to renew for two additional five-year terms. The leases permitted renewal on six months notice if none of the leases was in default.

Two subsidiaries of appellee the Circle K Corporation (New England Petroleum Distributors and Old Colony Petroleum) assertedly acquired the lessees' interests. After one

*The Honorable Byron R. White, Retired Associate Justice of the United States Supreme Court, sitting by designation.

renewal of the leases in 1987, the subsidiaries defaulted on some of the lease provisions; they and Circle K sought Chapter 11 bankruptcy protection. They obtained an extension of time from the bankruptcy court to make their decision to assume or reject the leases until after the June 1992 expiration of the first renewals.

Coleman brought an adversary action, alleging that the debtors were merely tenants at will. Coleman contended that the debtors were not assignees of the leases because the assignments were defective and violated the statute of frauds. Alternatively, Coleman asserted that even if the assignments were valid, the lessees had failed to exercise the options properly, so that the leases had expired unrenewed.

In March 1992, Old Colony and New England notified Coleman that they had elected to extend the leases for another five years, even though the prepetition defaults had not been cured. In the adversary action, the debtors moved for summary judgment. The bankruptcy court granted the motion.

The BAP affirmed, concluding that Coleman had failed to raise a material issue of fact regarding the debtors' status as assignees; Coleman lacked standing to challenge the assignments under the statute of frauds; and the debtors successfully renewed the leases even though they were in default at the time of the second exercise. As did the bankruptcy court, the BAP based its ruling on the rationale underlying 11 U.S.C. § 365: to balance the state-law contract right of the creditor to receive the benefit of its bargain with the federal law equitable right of the debtors to an opportunity to reorganize.

Coleman appealed, reiterating its position in the bankruptcy court, and asserting that summary judgment was inappropriate because it had raised an issue of material fact: the debtors' actions (contemporaneous requests to extend some of the same leases) had been inconsistent with the assignments.

[1] New England's and Old Colony's inconsistent or mistaken behavior did not make the assignments ineffective. In the face of the debtors' uncontradicted evidence, such minimal evidence of equivocal behavior would have been insufficient for a reasonable jury to find that the assignments had not occurred. [2] Coleman's invocation of the statute of frauds was meritless. Merely because it was the lessor, Coleman was not a party to any of the assignments. The parties to the assignments did not challenge their validity. It would have been for them, not Coleman, to raise the statute of frauds as a defense to enforcement of the assignments, if they so chose.

[3] The extensions in 1987 were no longer open to challenge. All parties acted as if the extensions were effective, and any objections to them had long since been waived. Coleman accepted rent and otherwise treated the debtors as lessees for years after 1987. Coleman was estopped from asserting ten years later that the leases expired in 1987. The leases remained effective from 1987 to 1992.

[4] There were defaults under at least some of the leases. The exact nature and extent of the defaults was immaterial because the bankruptcy court had the power to permit the debtors to extend the leases without first curing the defaults.

[5] In conjunction with the automatic stay, § 365 suspends the termination of lease that is in default; it extends the debtor lessee's opportunity to cure any defaults until the debtor has the chance to decide whether to assume the lease. The lessor will get the benefit of the bargain on assumption, when the debtor must cure the default.

[6] The practical effect of requiring the debtors to cure prepetition defaults in order to extend the leases would have been to require an early decision whether to assume or reject them. The bankruptcy court was not compelled to require a course of action that would have made the extension illusory, thus

depriving the debtors of the opportunity to reorganize without burdening the estate with unexpired lease obligations.

[7] All kinds of interference with contractual rights occur in bankruptcy proceedings. No principle of bankruptcy or contract law precluded the courts from permitting the debtors to extend the leases in a manner contrary to the leases' terms, when to do so would effectuate the purposes of § 365. [8] The debtors could exercise their final option to renew the leases without first curing the defaults. Thus renewed, the leases did not expire in 1992, and the debtors could assume them, curing the defaults or giving assurance of prompt cure at that time.

Judge Rymer concurred in part and dissented in part, concluding that § 365 does not extend the time to exercise an option to renew a lease, or to meet conditions precedent to doing so.

COUNSEL

Carolyn Johnsen, Herbert, Schenk, Johnsen & Dake, Phoenix, Arizona, for the appellants.

James L. Rasmussen, Kemp, Smith, Duncan & Hammond, Albuquerque, New Mexico, for the appellees.

OPINION

CANBY, Circuit Judge:

This case presents the question whether a lessee debtor in bankruptcy, prior to deciding whether to accept or reject non-residential leases, may exercise an option to renew the leases even though the lessee debtor is in default and the leases specify that they may not be renewed if in default.

The Coleman Oil Company, as lessor, leased six gasoline stations in New Hampshire and Maine for ten years, with options to the lessee to renew for two additional five-year terms. Each lease permitted renewal only if none of the leases was in default.

Two subsidiaries of the Circle K Corporation claimed to have acquired the lessees' interests under the leases by a series of acquisitions and mergers. After one renewal of the leases, disputed here, Circle K and its subsidiaries filed a Chapter 11 petition in bankruptcy. The lessee subsidiaries ("the Debtors") then sought and received an extension of time within which to assume or reject the leases. *See* 11 U.S.C. § 365(d)(4)(1994). The first five-year extension of the leases was due to expire, however, prior to the time when the Debtors were required to accept or reject the leases. In order to protect their future choice to accept or reject, the Debtors exercised their option to extend the leases for a second five-year term, even though pre-petition defaults in at least some of the leases had not been cured.

The paramount question before us is whether the need to preserve the Debtors' rights under 11 U.S.C. § 365 to accept or reject the leases overcomes the leases' requirement that none of the leases be in default at the time of renewal. We conclude, as did the bankruptcy court and the Bankruptcy Appellate Panel ("BAP"), that the leases may be renewed despite the uncured defaults. We also reject other arguments raised by appellants, and accordingly affirm the judgment of the BAP.

I. BACKGROUND

In November 1977, Coleman, as lessor, and Pickering Oil Heat, as lessee, entered into six leases. The leases covered the following gasoline and convenience store locations in Maine and New Hampshire: (1) Kittery; (2) Epping; (3) Exeter; (4) Dover; (5) Portsmouth; and (6) Durham.

The leases provided for an initial term of ten years, and gave Pickering the right to renew for two additional five-year terms under certain conditions:

> Lessee shall have two (2) additional and successive terms of five (5) years each . . . by giving the Lessor at least six (6) months written notice of such extension prior to the expiration of the original or any extended term as the case may be, *provided that Lessee's right to extend is conditioned upon the Lessee not being in default hereunder and is not in default of payments under any of the other leases* . . . .

ER 5 Exh. A at 2 (emphasis added). Thus, for Pickering or its assignees to extend the leases to the maximum period, they were required to exercise the first option by June 1987, and the second by June 1992.

The Debtors assert that they acquired Pickering's interest in the leases through a series of corporate mergers and acquisitions. Northeast Petroleum Inc. ("NPI") is the parent corporation of New England Petroleum and Old Colony Petroleum. NPI acquired Pickering's stock in December 1983 and merged with Charter International Oil in December 1989. Circle K acquired Charter in 1988. Circle K thus became the parent of New England and Old Colony. New England claims to be the assignee of the Kittery, Epping, Exeter, and Dover leases. Old Colony claims to be the assignee of the Portsmouth and Durham leases.[1]

During all of these transitions, Coleman received and accepted the full lease payments every month for each of the leases.

[1]Under the Chapter 11 Plan of Reorganization, Old Colony and New England merged into the Circle K Corporation. Because that merger occurred after the final extension of the leases, we ignore it for purposes of this opinion.

In March 1987, New England notified Coleman by letter that it elected to renew its leases for five years. In May 1987, Old Colony also notified Coleman by letter that it was exercising its renewal option. Coleman did not object to the renewals, and continued to accept the companies' rent payments.

New England and Old Colony defaulted under some of the lease provisions. The parties dispute the exact nature and timing of the defaults. It is agreed that New England failed to maintain the Kittery property. Coleman also states that Old Colony failed to pay the property taxes on the Durham and Portsmouth properties.

Circle K and its affiliates filed for Chapter 11 bankruptcy protection in May 1990. The Debtors requested, and were granted, extensions of time within which to assume or reject the Coleman leases. *See* 11 U.S.C. § 365(d)(4).

In October 1991, Coleman filed an adversary action in the bankruptcy court, seeking a declaration that the Debtors were merely tenants at will. Coleman argued that the Debtors were not assignees of the leases because the assignments had never been properly executed and violated the statute of frauds. Coleman also argued that, even if the Debtors were assignees, they had failed properly to exercise options to renew the leases, so that the leases expired either in 1987 or during the bankruptcy proceedings in 1992. Coleman also sought relief from the automatic stay so that it could take possession of the properties.

In March 1992, New England and Old Colony informed Coleman by letter of their election to extend the leases for another five year term. The Debtors then moved for summary judgment in the adversary action, asserting that: (1) they were the assignees of the leases and thus entitled to renew them; and (2) the renewals were effective even if the pre-petition

defaults had not been cured. The bankruptcy court granted the motion.

Coleman appealed to the BAP. The BAP affirmed, concluding that: (1) Coleman failed to raise a material issue of fact regarding the Debtors' status as assignees of the leases; (2) Coleman lacked standing to challenge the assignments under the statute of frauds; and (3) the Debtors successfully renewed the leases for both five-year terms even though they were in default at the time of the second extension. *Coleman Oil Co. v. Circle K Corp., (In re Circle K)*, 190 B.R. 370 (1996).

Judge Russell dissented. He agreed with the majority that the Debtors were the assignees of the leases and that Coleman lacked standing to challenge the assignments under the statute of frauds. He disagreed, however, with the majority's conclusions regarding the Debtors' post-petition extensions of the leases. He concluded that the Debtors' attempts to renew the leases for the second time were ineffective under the terms of the leases, because the Debtors were in default. *Id.* at 378-82.

II. ANALYSIS

A. Assignment Of The Leases

The first question is whether Coleman raised a triable issue of fact as to whether the Debtors were assignees of the six leases.[2] *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The Debtors have relied on a series of corporate mergers and acquisitions to establish their status as assignees. Although the chain of events is somewhat intricate, we conclude that the Debtors adequately established that the leases had been assigned to them.

[2]We review de novo the BAP's decisions. *Alsberg v. Robertson (In re Alsberg)*, 68 F.3d 312, 314 (9th Cir. 1995). We independently review bankruptcy court rulings on appeal from the BAP. *Finalco, Inc. v. Roosevelt, (In re Roosevelt)*, 87 F.3d 311, 314 (9th Cir. 1996).

NPI, the parent corporation of New England and Old Colony, became an assignee of the leases by acquiring Pickering, the original lessee, in December 1983. A Plan of Liquidation evidences that transaction, and states that "Pickering will transfer all its assets" to NPI. ER 5 Exh. P. at 1. Charter then merged with NPI in 1989, after Circle K had acquired Charter in 1988. A Stock Purchase Agreement evidences Circle K's acquisition of Charter. ER 5 Exh. N.

Circle K thus became the parent corporation of New England and Old Colony. There is a written assignment of the Portsmouth and Durham leases from NPI to Old Colony dated May 1985. ER 5 Exh. B. As to the four New England leases, the Debtors produced an affidavit and a May 1989 letter from New England's counsel to Coleman. ER 7 at 2-3, Exh. 1. The affidavit is of Paul Welch, the president of New England, and he states that New England became the assignee of the four leases in March 1987. ER 7 at 2-3. The May 1989 letter confirms that information. ER 7 Exh. 1. We thus conclude that Coleman's attacks on the "paper trail" lack merit.

[1] Coleman argues that it nonetheless has raised an issue of fact because the Debtors' actions have been inconsistent with the supposed assignments. Coleman points to New England's and Old Colony's contemporaneous requests to extend some of the same leases. Coleman also points to an October 1992 retroactive written assignment of four leases to New England. As the Debtors respond, however, any inconsistent or mistaken behavior on their part does not make the actual assignments ineffective. Moreover, we conclude that such minimal evidence of equivocal behavior would be insufficient, in the face of the Debtors' other uncontradicted evidence, for a reasonable jury to find that the assignments had not occurred. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). We thus conclude that Coleman has failed to raise a genuine issue of material fact regarding the assignments. *See id.* ("The mere existence of a scintilla of evidence

in support of the plaintiff's position will be insufficient" to defeat summary judgment).

[2] Coleman finally contends that the assignments are invalid because the Debtors have not produced formal written instruments of transfer. There is, however, a written assignment of the Portsmouth and Durham leases from NPI to Old Colony dated May 1985. ER 5 Exh. B. In any event, the leases do not require that assignments be in writing. The leases give the lessee the right simply to assign, with the condition only that the original lessee remain primarily liable. *See* ER 7 Exh. B. Coleman's invocation of the statute of frauds is meritless. Coleman is not, merely because it is the lessor, a party to any assignments of the leases. *See* 37 C.J.S. *Statute of Frauds* § 220 (1943). The parties to the assignments do not challenge their validity; it would be for them, not Coleman, to raise the statute of frauds as a defense to enforcement of the assignments if they so chose. *See id.*; *see also* Restatement (Second) of Contracts § 144 (1982). We conclude, therefore, that the Debtors were properly granted summary judgment on this point.

B. Extension of the Leases

The next question is whether the Debtors successfully extended the leases in 1987 and 1992. The leases placed two conditions on renewal: (1) the Debtors had to give Coleman six months advance written notice of their intent to renew; and (2) the Debtors could not be in default on any lease at the time of renewal. ER 5 Exh. A at 2. Coleman contends that the Debtors failed to meet these conditions for the renewals in 1987 and in 1992.

1. Extension Of The Leases In 1987

With regard to the 1987 renewals, Coleman contends that the Debtors failed to meet both the notice and the default requirements. Coleman argues that the Debtors did not meet

the notice requirement because Old Colony and New England gave notice of extensions of leases that they had not yet been assigned. Coleman also asserts that at least the Kittery lease was in default in 1987.

[3] We conclude that the extensions in 1987 are no longer open to challenge. Whether there were any defaults and whether there was any imperfection in the way that the notice was given, all parties acted as if the extensions were effective and any objections to them have long since been waived. *See, e.g., Oxford Properties & Fin. Ltd. v. Engle*, 943 F.2d 1150, 1153-54 (9th Cir. 1991). Coleman continually accepted rent from the Debtors and otherwise treated the Debtors as lessees for many years after 1987. Coleman is estopped from asserting now, ten years later, that the leases expired in 1987. *See id.* The leases thus remained effective for the five-year term from 1987 to 1992.

2. Extension Of The Leases In 1992

[4] With respect to the 1992 post-bankruptcy-petition extension of the leases, Coleman argues that the Debtors' renewals were ineffective because the leases were in default. We agree that there were defaults under at least some of the leases.[3] There was a pre-petition default on the Kittery lease because the Debtors left the property in disrepair. There also may have been some monetary pre-petition defaults on the Durham, Portsmouth, and Epping leases. The exact nature and extent of the defaults is immaterial because, for reasons we will now explain, we conclude that the bankruptcy court had the power to permit the Debtors to extend the leases without first curing the defaults. The Debtors thus preserved their ability later to assume the leases. *See* 11 U.S.C. § 365(a).

[3]Because we conclude that the 1992 renewals were effective even though there were defaults, we need not resolve the issue of the enforceability in bankruptcy of the leases' cross-default provisions, under which a default in any lease prevents renewal of all of them.

[5] The bankruptcy court and the BAP based their rulings on the rationale underlying section 365.[4] As the BAP stated, "[t]he purpose behind § 365 is to balance the state law contract right of the creditor to receive the benefit of his bargain with the federal law equitable right of the debtor to have an opportunity to reorganize." *Coleman Oil Co.*, 190 B.R. at 376; *see also City of San Francisco Market Corp. v. Walsh, (In re Moreggia & Sons, Inc.)*, 852 F.2d 1179, 1185 (9th Cir. 1988). Section 365, in conjunction with the automatic stay provision of section 362, accordingly suspends, once the bankruptcy petition is filed, the termination of a lease that is in default; it extends[5] a debtor lessee's opportunity to cure any defaults until the debtor has the chance to decide whether to assume the lease. *See* 11 U.S.C. §§ 362, 365 (1994); *Post v. Sigel & Co., (In re Sigel & Co.)*, 923 F.2d 142, 144-45 (9th Cir. 1991). The lessor will then get the benefit of its bargain upon assumption, when the debtor lessee must cure the defaults. *See* 11 U.S.C. § 365(b)(1).

If the bankruptcy court could not allow a debtor lessee to renew a lease without first curing defaults, section 365's basic purpose would be frustrated. The debtor would be denied the benefit of section 365's "suspension of time" in order to determine whether to assume or reject the lease. *See id.* § 365(d)(4). For example, if the bankruptcy court could not permit the Debtors to exercise their renewal option without

[4]The curing of defaults in an executory contract or unexpired lease is governed by section 365, not by the more restrictive extension-of-time provisions of section 108(b). *See Moody v. Amoco Oil Co.*, 734 F.2d 1200, 1215-16 (7th Cir. 1984). We agree with the majority of the BAP that section 365 also encompasses the curing of defaults prior to the exercise of an option to renew. *See Coleman Oil Co.*, 190 B.R. at 377-78. On this appeal, neither party has contended that section 108(b) governs.

[5]The "extension" minimally is 60 days from the date of the order for relief. *See* 11 U.S.C. § 365(d)(4). But the bankruptcy court, as in this case, often grants the debtor's request to extend that period. *See id.*; *see, e.g., Willamette Waterfront, Ltd. v. Victoria Station, Inc., (In re Victoria Station Inc.)*, 875 F.2d 1380, 1384-85 (9th Cir. 1989).

curing their pre-petition defaults, the Debtors' later choice to assume or reject the leases, guaranteed by section 365, becomes flawed. If the Debtors failed to cure the defaults at renewal (as they did in this case), the leases would expire and the Debtors would be wholly unable later to exercise the choice to assume or reject the unexpired leases. On the other hand, if the Debtors cured the defaults in order to preserve their option to assume or reject, and if they later chose to reject, they would have been forced into granting a preference. In the usual case where an unexpired lease is rejected by the choice of the debtor, any pre-petition defaults become unsecured claims against the bankruptcy estate. *See e.g., Pacific Express, Inc. v. Teknetron Infoswitch Corp. (In re Pacific Express, Inc.)*, 780 F.2d 1482, 1486 (9th Cir. 1986). If, however, the Debtors have been forced to cure the pre-petition defaults in order to preserve their choice to assume or reject, then a later election to reject leaves the lessor with a preference over other pre-petition general creditors.

[6] The practical effect of requiring the Debtors to cure pre-petition defaults in order to extend the leases thus would be to require an early decision whether to assume or reject the leases. But the bankruptcy court here had explicitly extended beyond June 1992 the Debtors' time to decide whether to assume or reject. The bankruptcy court was not compelled to require a course of action that would render its extension of time illusory, thus depriving the Debtors of the opportunity to reorganize without prematurely burdening the estate with unexpired lease obligations.[6] *See Willamette Waterfront, Ltd.*, 875 F.2d at 1384-85.

---

[6]Of course, the Debtors were required to perform obligations of the leases arising after the order for relief and before assumption of the leases. *See* 11 U.S.C. § 365(d)(3). The only post-petition default established here was less than $200 with regard to one property. The amount was tendered when notice of the default was given to the Debtors. The bankruptcy court characterized this default as *de minimis* and we agree. In these circumstances, the BAP did not err in concluding that, in order to preserve the choice under section 365 to assume or reject the leases, cure of this default, too, was not required for exercise of the option to renew.

We find persuasive the reasoning in *In re Webster, Clothes, Inc.*, 36 B.R. 260 (D. Md. 1984). There, the bankruptcy court implied a power under section 365 to allow a debtor lessee to exercise options. As in the present case, Webster's leases provided for options to extend, but only so long as Webster was not in default. *See id.* at 262. Webster was in default under the leases, but the court held that Webster nonetheless could extend them. *Id.* at 262-63. The court concluded that the general purpose behind section 365 supported such a result, noting that the section's goal is "the preservation of the status quo until the debtor-in-possession decides whether to assume or reject." *Id.* at 263. We recognize that *Webster* was decided before the 1984 amendments to section 365, at a time when the debtor had no obligation to exercise the choice to assume or reject a lease until confirmation of the plan. The result in *Webster* accordingly was based in part on the failure of the lessor to move to shorten the time for election. *See id.* at 264; *see also Cook United, Inc. v. Washington Distrib., Inc.*, 53 B.R. 342, 345 (N.D. Ohio 1985). But the remaining rationale of *Webster* is applicable here: a future election under section 365 to assume or reject will be rendered largely illusory if pre-petition defaults must be cured in order to keep the lease alive for the election.

[7] Coleman argues that the bankruptcy court lacks the power to "re-write" the parties' contract. *See, e.g., Shokbeton Indus., Inc. v. Shokbeton Products Corp.*, (*In re Shokbeton Indus.*), 466 F.2d 171 (5th Cir. 1972). But all kinds of interferences with contractual rights occur in bankruptcy proceedings. Section 365(a) permits a debtor to reject an executory contract or unexpired lease altogether, which wholly contravenes the contract or lease as written. The automatic stay in bankruptcy frequently prevents the enforcement of contracts according to their terms. We have held that a bankruptcy debtor may cure a default and avoid the termination of a contract even if the contract does not allow for cure. *Post*, 923 F.2d at 144-45. Thus no principle of bankruptcy or contract law precludes us from permitting the Debtors here to extend

their leases in a manner contrary to the leases' terms, when to do so will effectuate the purposes of section 365.

[8] We therefore affirm the BAP's decision that the Debtors could exercise their final option to renew the leases without first curing the pre-petition defaults. Thus renewed, the leases did not expire in 1992, and the Debtors could later assume them, curing the defaults or giving assurance of prompt cure at that time. *See* 11 U.S.C. § 365(b)(1)(A).

III. CONCLUSION

The Debtors provided ample evidence to show that they are assignees of the leases, and Coleman has not raised a material issue of fact on that issue. Coleman is estopped from asserting that Circle K's five-year extension of the leases in 1987 was ineffective; Coleman and the Debtors for years acted as if the extension had been properly executed. Finally, to effectuate the objectives of 11 U.S.C. § 365, Circle K could exercise the 1992 post-bankruptcy-petition renewal options even though there were defaults under the leases.

The judgment of the BAP is **AFFIRMED.**

RYMER, Circuit Judge, concurring in part and dissenting in part:

The path to deciding whether 11 U.S.C. § 365 allows a lessee debtor in bankruptcy to exercise an option to renew despite being in default, contrary to an express condition precedent in the lease, is uncharted. While the majority's view is plausible, I see nothing in § 365 that allows debtors to disregard their leases and renew while in default.

Because exercising the option to renew was conditioned on not being in default on the leases, and the leases were in

default at the time the debtors tried to exercise the option, the right to renew was lost. Section 365 does not extend the time to exercise the option or to meet conditions precedent. Nor does § 365 give the debtor the right to opt to renew a contract that is in default when the contract by its terms requires that a default first be cured.

To hold otherwise rewrites the lease and, as I read it, § 365. Therefore, for the reasons given by Bankruptcy Judge Russell in his BAP dissent, *Coleman Oil Co., Inc. v. The Circle K Corp. (In re The Circle K Corp.)*, 190 B.R. 370, 378-82 (1995) (Russell, B.J., dissenting), I would reverse.

Although I agree that Coleman's arguments about the chain of title and the statute of frauds fail, there are disputes of fact about who was in default and where. I would leave these issues, as well as state law forfeiture issues, to the bankruptcy court on remand.

Chapter 365

Executory Contracts and Unexpired Leases

BANKRUPTCY CODE, Section 365

(11 U.S.C. § 365)

§ 365. **Executory contracts and unexpired leases.**

(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

(b) (1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee—

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default;

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

(2) Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to—

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title;

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement; or

(D) the satisfaction of any penalty rate or provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease.

(3) For the purposes of paragraph (1) of this subsection and paragraph (2)(B) of subsection (f), adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance—

(A) of the source of rent and other consideration due under such lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease;

(B) that any percentage rent due under such lease will not decline substantially;

(C) that assumption or assignment of such lease is subject to all the provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity provision, and will not breach any such provision contained in

any other lease, financing agreement, or master agreement relating to such shopping center; and

(D) that assumption or assignment of such lease will not disrupt any tenant mix or balance in such shopping center.

(4) Notwithstanding any other provision of this section, if there has been a default in an unexpired lease of the debtor, other than a default of a kind specified in paragraph (2) of this subsection, the trustee may not require a lessor to provide services or supplies incidental to such lease before assumption of such lease unless the lessor is compensated under the terms of such lease for any services and supplies provided under such lease before assumption of such lease.

(c) The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—

(1)(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(B) such party does not consent to such assumption or assignment;

or

(2) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor;

(3) such lease is of nonresidential real property and has been terminated under applicable nonbankruptcy law prior to the order for relief; or

(4) such lease is of nonresidential real property under which the debtor is lessee of an aircraft terminal or aircraft gate at an airport at which the debtor is the lessee under one or more additional nonresidential leases of an aircraft terminal or aircraft gate and the trustee, in connection with such assumption or assignment, does not assume all such leases or does not assume and assign all of such leases to the same person, except that the trustee may assume or assign less than all of such leases with the airport operator's written consent.

(d) (1) In a case under chapter 7 of this title, if the trustee does not assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract or lease is deemed rejected.

(2) In a case under chapter 9, 11, 12, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court, on the request of any party to such contract or lease, may order the trustee to determine within a specifed period of time whether to assume or reject such contract or lease.

(3) The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title. The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, but the time for performance shall not be extended beyond such 60-day period. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f) of this section. Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(4) Notwithstanding paragraphs (1) and (2), in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor.

(5) Notwithstanding paragraphs (1) and (4) of this subsection, in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is an affected air carrier that is the lessee of an aircraft terminal or aircraft gate before the occurrence of a termination event, then (unless the court orders the trustee to assume such unexpired leases within 5 days after the termination event), at the option of the airport operator, such lease is deemed

rejected 5 days after the occurrence of a termination event and the trustee shall immediately surrender possession of the premises to the airport operator; except that the lease shall not be deemed to be rejected unless the airport operator first waives the right to damages related to the rejection. In the event that the lease is deemed to be rejected under this paragraph, the airport operator shall provide the affected air carrier adequate opportunity after the surrender of the premises to remove the fixtures and equipment installed by the affected air carrier.

(6) For the purposes of paragraph (5) of this subsection and paragraph (f)(l) of this section, the occurrence of a termination event means, with respect to a debtor which is an affected air carrier that is the lessee of an aircraft terminal or aircraft gate—

(A) the entry under section 301 or 302 of this title of an order for relief under chapter 7 of this title;

(B) the conversion of a case under any chapter of this title to a case under chapter 7 of this title; or

(C) the granting of relief from the stay provided under section 362(a) of this title with respect to aircraft, aircraft engines, propellers, appliances, or spare parts, as defined in section 101 of section 40102 of title 49, except for property of the debtor found by the court not to be necessary to an effective reorganization.

(7) Any order entered by the court pursuant to paragraph (4) extending the period within which the trustee of an affected air carrier must assume or reject an unexpired lease of nonresidential real property shall be without prejudice to—

(A) the right of the trustee to seek further extensions within such additional time period granted by the court pursuant to paragraph (4); and

(B) the right of any lessor or any other party in interest to request, at any time, a shortening or termination of the period within which the trustee must assume or reject an unexpired lease of nonresidential real property.

(8) The burden of proof for establishing cause for an extension by an affected air carrier under paragraph (4) or the maintenance of a previously granted extension under paragraph (7)(A) and (B) shall at all times remain with the trustee.

(9) For purposes of determining cause under paragraph (7) with respect to an unexpired lease of nonresidential real property between the debtor that is an affected air carrier and an airport operator under which such debtor is the lessee of an airport terminal or an airport gate, the court shall consider, among other relevant factors, whether substantial harm will result to the airport operator or airline passengers as a result of the extension or the maintenance of a previously granted extension. In making the determination of substantial harm, the court shall consider, among other relevant factors, the level of actual use of the terminals or gates which are the subject of the lease, the public interest in actual use of such terminals or gates, the existence of competing demands for the use of such terminals or gates, the effect of the court's extension or termination of the period of time to assume or reject the lease on such debtor's ability to successfully reorganize under chapter 11 of this title, and whether the trustee of the affected air carrier is capable of continuing to comply with its obligations under section 365(d)(3) of this title.

(10) The trustee shall timely perform all of the obligations of the debtor, except those specified in section 365(b)(2), first arising from or after 60 days after the order for relief in a case under chapter 11 of this title under an unexpired lease of personal property (other than personal property leased to an individual primarily for personal, family, or household purposes), until such lease is assumed or rejected notwithstanding section 503(b)(1) of this title, unless the court, after notice and a hearing and based on the equities of the case, orders otherwise with respect to the obligations or timely performance thereof. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f). Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(e) (1) Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on—

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title; or

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

(2) Paragraph (1) of this subsection does not apply to an executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—

(A) (i) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to the trustee or to an assignee of such contract or lease, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(ii) such party does not consent to such assumption or assignment;

or

(B) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor.

(f)(1) Except as provided in subsection (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection; except that the trustee may not assign an unexpired lease of nonresidential real property under which the debtor is an affected air carrier that is the lessee of an aircraft terminal or aircraft gate if there has occurred a termination event.

(2) The trustee may assign an executory contract or unexpired lease of the debtor only if—

(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and

(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

(3) Notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law that terminates or modifies, or permits a party other than the debtor to terminate or modify, such contract or lease or a right or obligation under such contract or lease on account of an assignment of such contract or lease, such contract, lease, right, or obligation may not be terminated or modified under such provision because of the assumption or assignment of such contract or lease by the trustee.

(g) Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease—

(1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title, immediately before the date of the filing of the petition; or

(2) if such contract or lease has been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title—

(A) if before such rejection the case has not been converted under section 1112, 1208, or 1307 of this title, at the time of such rejection; or

(B) if before such rejection the case has been converted under section 1112, 1208, or 1307 of this title—

(i) immediately before the date of such conversion, if such contract or lease was assumed before such conversion; or

(ii) at the time of such rejection, if such contract or lease was assumed after such conversion.

(h) (1) (A) If the trustee rejects an unexpired lease of real property under which the debtor is the lessor and—

(i) if the rejection by the trustee amounts to such a breach as would entitle the lessee to treat such lease as terminated by virtue of its terms, applicable nonbankruptcy law, or any agreement made by the lessee, then the lessee under such lease may treat such lease as terminated by the rejection; or

(ii) if the term of such lease has commenced, the lessee may retain its rights under such lease (including rights such as those relating to the amount and timing of payment of rent and other amounts payable by the lessee and any right of use, possession, quiet enjoyment, subletting, assignment, or hypothecation) that are in or appurtenant to the real property for the balance of the term of such lease and for any renewal or extension of such rights to the extent that such rights are enforceable under applicable nonbankruptcy law.

(B) If the lessee retains its rights under subparagraph (A)(ii), the lessee may offset against the rent reserved under such lease for the balance of the term after the date of the rejection of such lease and for the term of any renewal or extension of such lease, the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor

under such lease, but the lessee shall not have any other right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.

(C) The rejection of a lease of real property in a shopping center with respect to which the lessee elects to retain its rights under subparagraph (A)(ii) does not affect the enforceability under applicable nonbankruptcy law of any provision in the lease pertaining to radius, location, use, exclusivity, or tenant mix or balance.

(D) In this paragraph, "lessee" includes any successor, assign, or mortgagee permitted under the terms of such lease.

(2) (A) If the trustee rejects a timeshare interest under a timeshare plan under which the debtor is the timeshare interest seller and—

(i) if the rejection amounts to such a breach as would entitle the timeshare interest purchaser to treat the timeshare plan as terminated under its terms, applicable nonbankruptcy law, or any agreement made by timeshare interest purchaser, the timeshare interest purchaser under the timeshare plan may treat the timeshare plan as terminated by such rejection; or

(ii) if the term of such timeshare interest has commenced, then the timeshare interest purchaser may retain its rights in such timeshare interest for the balance of such term and for any term of renewal or extension of such timeshare interest to the extent that such rights are enforceable under applicable nonbankruptcy law.

(B) If the timeshare interest purchaser retains its rights under subparagraph (A), such timeshare interest purchaser may offset against the moneys due for such timeshare interest for the balance of the term after the date of the rejection of such timeshare interest, and the term of any renewal or extension of such timeshare interest, the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor under such timeshare plan, but the timeshare interest purchaser shall not have any right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.

(i)(l) If the trustee rejects an executory contract of the debtor for the sale of real property or for the sale of a timeshare interest under a timeshare plan, under which the purchaser is in possession, such purchaser may treat such contract as terminated, or, in the alternative, may remain in possession of such real property or timeshare interest.

(2) if such purchaser remains in possession—

(A) such purchaser shall continue to make all payments due under such contract, but may, offset against such payments any damages occurring after the date of the rejection of such contract caused by the non-performance of any obligation of the debtor after such date, but such purchaser does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset; and

(B) the trustee shall deliver title to such purchaser in accordance with the provisions of such contract, but is relieved of all other obligations to perform under such contract.

(j) A purchaser that treats an executory contract as terminated under subsection (i) of this section, or a party whose executory contract to purchase real property from the debtor is rejected and under which such party is not in possession, has a lien on the interest of the debtor in such property for the recovery of any portion of the purchase price that such purchaser or party has paid.

(k) Assignment by the trustee to an entity of a contract or lease assumed under this section relieves the trustee and the estate from any liability for any breach of such contract or lease occurring after such assignment.

(1) If an unexpired lease under which the debtor is the lessee is assigned pursuant to this section, the lessor of the property may require a deposit or other security for the performance of the debtor's obligations under the lease substantially the same as would have been required by the landlord upon the initial leasing to a similar tenant.

(m) For purposes of this section 365 and sections 541(b)(2) and 362(b)(10), leases of real property shall include any rental agreement to use real property.

(n) (1) If the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual property, the licensee under such contract may elect—

(A) to treat such contract as terminated by such rejection if such rejection by the trustee amounts to such a breach as would entitle the licensee to treat such contract as terminated by virtue of its own terms, applicable nonbankruptcy law, or an agreement made by the licensee with another entity; or

(B) to retain its rights (including a right to enforce any exclusivity provision of such contract, but excluding any other right under applicable nonbankruptcy law to specific performance of such contract) under such contract and under any agreement supplementary to such contract, to such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law), as such rights existed immediately before the case commenced, for—

(i) the duration of such contract; and

(ii) any period for which such contract may be extended by the licensee as of right under applicable nonbankruptcy law.

(2) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, under such contract—

(A) the trustee shall allow the licensee to exercise such rights;

(B) the licensee shall make all royalty payments due under such contract for the duration of such contract and for any period described in paragraph (1)(B) of this subsection for which the licensee extends such contract; and

(C) the licensee shall be deemed to waive—

(i) any right of setoff it may have with respect to such contract under this title or applicable nonbankruptcy law; and

(ii) any claim allowable under section 503(b) of this title arising from the performance of such contract.

(3) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, then on the written request of the licensee the trustee shall—

(A) to the extent provided in such contract, or any agreement supplementary to such contract, provide to the licensee any intellectual property (including such embodiment) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment) including any right to obtain such intellectual property (or such embodiment) from another entity.

(4) Unless and until the trustee rejects such contract, on the written request of the licensee the trustee shall—

(A) to the extent provided in such contract or any agreement supplementary to such contract—

(i) perform such contract; or

(ii) provide to the licensee such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment), including any right to obtain such intellectual property (or such embodiment) from another entity.

(o) In a case under chapter 11 of this title, the trustee shall be deemed to have assumed (consistent with the debtor's other obligations under section 507), and shall immediately cure any deficit under, any commitment by the debtor to a Federal depository institutions regulatory agency (or predecessor to such agency) to maintain the capital of an insured depository institution, and any claim for a subsequent breach of the obligations thereunder shall be entitled to priority under section 507. This subsection shall not extend any commitment that would otherwise be terminated by any act of such an agency.

Supreme Court, U.S.
FILED
JAN 29 1998
CLERK

(2)

No. 97-1067

In The

Supreme Court of the United States

October Term, 1997

COLEMAN OIL COMPANY, INC.,

Petitioner,

vs.

THE CIRCLE K CORPORATION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

JAMES L. RASMUSSEN*
JAMES T. REIST
KEMP, SMITH, DUNCAN
& HAMMOND, P.C.
500 Marquette N.W.
Suite 1200
Albuquerque, NM 87102-2121
(505) 247-2315

Attorneys for Respondents

* *Counsel of Record*

13 pp

QUESTIONS PRESENTED FOR REVIEW

Whether the Bankruptcy Code, and, in particular, the 11 U.S.C. § 365 right to cure defaults in connection with assumption of leases within the time permitted by § 365(d)(4) (extended by the bankruptcy court pursuant to § 365(d)(4) without objection by the landlord) precludes that landlord from relying on alleged prepetition defaults to avoid a postpetition, pre-confirmation, pre-assumption extension of the terms of the leases by reason of lease provisions providing for such extension of the terms upon timely notice of extension, if the lessee is not in default.

> And, but only in the event of the Court's granting the Petition and eventual disagreement with the rationale of the courts below:

Whether the summary judgment assuming the leases should be affirmed as to all or some of the six leases by reason of Petitioner's failure to show a genuine issue of fact as to its non-satisfaction of notice of default requirements, by reason of anti-forfeiture principles, or otherwise.

LIST OF PARTIES

The Petition lists the parties named in the adversary proceeding and motions to assume leases which led to the summary judgment affirmed by the Ninth Circuit.

Of the named Respondents, Old Colony Petroleum Company, Inc. ("OCP") and New England Petroleum Distributors, Inc. ("NEPD") (the lessees under the leases in question during relevant periods) were wholly owned subsidiaries of NPI Corporation ("NPI") which became a wholly owned subsidiary of The Circle K Corporation in 1988.

The Circle K Corporation and affiliates filed Chapter 11 Bankruptcy proceedings in 1990. Pursuant to the confirmed plan of reorganization, OCP was merged into Circle K Convenience Stores, Inc. The Circle K Corporation which is named in the adversary proceeding also merged into Circle K Convenience Stores, Inc., which changed its name to The Circle K Corporation. In 1995, that Circle K Corporation, a Texas corporation, changed its name to Circle K Stores, Inc. and its parent, Circle K Holdings, Inc., a Delaware corporation, changed its name to The Circle K Corporation.

The Circle K Corporation, a Delaware corporation, is now a wholly owned subsidiary of Tosco Corporation, a Nevada corporation, which is publicly held.

The Respondents have no subsidiaries other than those which are wholly owned.

Interested parties also include:

Gibbs Oil Company Limited Partnership (assignee of the lessee's interests previously held by OCP, with certain

indemnification rights (with respect to the underlying litigation) against The Circle K Corporation, the Texas corporation n/k/a Circle K Stores, Inc., and Circle K Properties, Inc., which has now been merged into Circle K Stores, Inc.)

New England Petroleum Limited Partnership (assignee of the lessee's interests previously held by NEPD, with certain indemnification rights against The Circle K Corporation (the Texas corporation n/k/a Circle K Stores, Inc.), NEPD, and Charter Marketing Company(Connecticut) with respect to the underlying litigation)

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
List of Parties	ii
Table of Contents	iv
Table of Citations	v
Opinions of the Courts Below	1
Statement of the Case	1
Reasons for Denying the Writ	5
I. Petitioner Has Overstated The Issue In This Case In Order To Exaggerate Both Its Importance And Any Negative Effect On The Commercial Marketplace.	5
II. The Courts Below Have Followed Standard Principles Of Statutory Construction And Have Correctly Interpreted § 365.	9
A. The courts below correctly construed the right to cure in the context of the Bankruptcy Code as a whole.	9
B. Coleman misapplies the principle: *expressio unius est exclusio alterum.*	11

Contents

Page

C. Coleman's misapplies the general principle that the leases must be assumed with their burdens intact. 13

D. Coleman has misread the plain language of § 365(d)(3). 14

E. Coleman has received (or will receive upon its compliance with the exercise of the purchase options) the full benefit of its bargain as made in the leases it freely entered into. 19

F. The summary judgment should be upheld in whole or in part, even if the courts below erred as to § 365. 21

Conclusion 22

TABLE OF CITATIONS

Cases Cited:

C Co. v. City of Westbrook, 269 A.2d 307 (Me. 1970) 8

City of Covington v. Covington Landing Limited Partnership, 71 F.3d 1221 (6th Cir. 1995) 14

Finn v. Meighan, 325 U.S. 300 (1945) 7, 8

Contents

	Page
Fletcher v. Frisbee, 404 A.2d 1106 (N.H. 1979)	8
In re Amber's Stores, Inc., 193 B.R. 819 (Bankr. N.D. Tex. 1996)	16
In re Best Products, Inc., 206 B.R. 404 (Bankr. E.D. Va. 1997)	18
In re Braniff, Inc., 118 B.R. 819 (Bankr. M.D. Fla. 1989)	21
In re Cochise College Park, Inc., 703 F.2d 1339 (9th Cir. 1983)	16
In re Crabb, 48 B.R. 165 (Bankr. D. Mass. 1985) ...	18
In re Ernst Home Center, Inc, 209 B.R. 955 (Bankr. W.D. Wash. 1997)	16
In re Forest Hills Assoc., 40 B.R. 410 (Bankr. S.D.N.Y. 1984)	20
In re Handy Andy Home Improvement Centers, Inc., 196 B.R. 87 (Bankr. N.D. Ill 1996)	16, 17
In re Mr. Grocer, Inc., 77 B.R. 349 (Bankr. D. N.H. 1987)	21
In re MS Freight Distribution, Inc., 172 B.R. 976 (Bankr. W.D. Wash. 1994)	16

Contents

	Page
In re Pacific Express, Inc., 780 F.2d 1482 (9th Cir. 1986)	10
In re RB Furniture, Inc., 141 B.R. 706 (Bankr. C.D. Calif. 1992)	9, 12
In re Sambo's Restaurants, Inc., 24 B.R. 755 (Bankr. C.D. Cal. 1982)	21
In re Sanshoe Worldwide Corp., 139 B.R. 585 (S.D.N.Y. 1992), *aff'd*, 993 F.2d 300 (2d. Cir. 1993)	21
In re Sigel & Co. Ltd., 923 F.2d 142 (9th Cir. 1991)	9, 12
In re Taddeo, 685 F.2d 2 (2d Cir. 1982)	12
Lindsey v. Dayton-Hudson Corp., 592 F.2d 1118 (10th Cir.), *cert. denied*, 444 U.S. 856 (1979)	21
N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)	12
Paul Harris Stores v. Mabel L. Salter Realty Trust, 148 B.R. 307 (S.D. Ind. 1992)	15
Santa Fe, Prescott, and Phoenix Railway Co. v. Grant Bros. Construction Co., 228 U.S. 177 (1913)	6
Sullivan v. Everhart, 494 U.S. 83 (1990)	9, 15
United Savings Ass'n of Texas v. Timbers of Inwood Forest Assoc., Ltd., 484 U.S. 365 (1988)	20

Contents

Page

United States v. Energy Resources Co., 495 U.S. 545 (1990) 13

United States v. Menasche, 348 U.S. 528 (1955) 12

United States v. Ron Pair Enterprises, Inc., 489 U.S. 235 (1989) 14, 17

Statutes Cited:

11 U.S.C. § 105 11

11 U.S.C. § 105(a) 11, 13

11 U.S.C. § 105(b) 13

11 U.S.C. § 362 10

11 U.S.C. §§ 363(*l*) 11

11 U.S.C. § 365 .....i, 3, 4, 5, 9, 11, 13, 14, 19, 21

11 U.S.C. § 365(a) 9, 12, 13, 14

11 U.S.C. § 365(b)(1) 12, 13, 14

11 U.S.C. § 365(b)(1)(A) 9, 10

11 U.S.C. § 365(b)(2) 13, 15

11 U.S.C. § 365(b)(2)(A) 11

Contents

	Page
11 U.S.C. § 365(b)(2)(B)	11
11 U.S.C. § 365(b)(2)(D)	7
11 U.S.C. § 365(d)(3)	14, 15, 16, 17, 18
11 U.S.C. § 365(d)(4)	2, 9, 10, 11, 12, 13, 20
11 U.S.C. § 365(e)	20
11 U.S.C. § 365(g)(1)	10
11 U.S.C. § 507	10
11 U.S.C. § 1122	10
11 U.S.C. § 1123(a)(4)	10
N.H. Rev. Stat. Ann. § 540:1-a(I) (1992 Cum. Supp.)	7
N.H. Rev. Stat. Ann. § 540:2(I) (1992 Cum. Supp.)	7
N.H. Rev. Stat. Ann. § 540:3(III) (1992 Cum. Supp.)	7
N.H. Rev. Stat. Ann. § 540:28 (1992 Cum. Supp.)	7
Other Authority Cited:	
H.R. Rep. No. 882, 95th Cong., 2d Sess. 1984 reprinted in *1984 U.S. Code Cong. & Admin. News* 576	17

Contents

Page

APPENDIX

Appendix A — Transcript Of Proceedings Dated March 17, 1995 ..... 1a

Appendix B — Excerpted Lease Paragraphs 3, 15 And 19 ..... 24a

Appendix C — Stipulated Order Of The United States Bankruptcy Court For The District Of Arizona Entered September 17, 1997 ..... 30a

OPINIONS OF THE COURTS BELOW

The transcript of the bankruptcy court's oral ruling granting the summary judgment is omitted from Petitioner's Appendix (hereafter, "P.A."), but included in the Appendix hereto (hereafter, "A.").

P.A. omits the exhibits (legal descriptions of the leased properties) to the Order of the bankruptcy court.

STATEMENT OF THE CASE

Petitioner Coleman Oil Company, a New Hampshire corporation, ("Coleman") leased various retail gasoline stores, primarily in New Hampshire, to one of Respondents' predecessors in interest. Old Colony Petroleum Company, Inc. ("OCP") became the holder of the lessee's interest in two of the leases. New England Petroleum Distributors, Inc. ("NEPD") became the holder of the lessee's interest in four. Coleman does not seek review of the determinations of the courts below that OCP (and subsequently its successor The Circle K Corporation, n/k/a Circle K Stores, Inc.) and NEPD, in fact, held the lessee's rights under those six leases. Petition (hereafter, "P.") i and 17; P.A. 4a-5a, 14a-17a, 51a-53a.

Each lease includes the right to extend the term for two additional five year periods, provided that the particular lease was not in default and that the other leases were not in payment default. Lease ¶ 3. Each lease provides for cure periods after lessee's receipt of notice of default from the lessor. Lease ¶ 15. Each lease also includes an option to purchase, provided that the particular lease was not in default and that the other leases were not in payment default. Lease ¶ 19. A copy of the cited provisions from one of the leases is at A. 24a-29a. The parties agree that each of the leases is substantially identical except for the property description, the rent amount and the purchase option price. *See* Appellant's Opening Br. (to Ninth Circuit) at 4.

On May 15, 1990, The Circle K Corporation and affiliated subsidiaries including OCP and NEPD filed Chapter 11 bankruptcy petitions. The affiliated debtors-in-possession ("Debtors") had over 4,500 leases to evaluate for assumption or rejection for the benefit of their jointly administered estates. *See* Appellee's Excerpt of Record (to Ninth Circuit) 10, 11, and 12. The bankruptcy court granted Debtors' requests pursuant to 11 U.S.C. § 365(d)(4) for extensions of time in which to assume or reject. Coleman did not at any time object to the extensions of time and did not seek at any time to require an earlier decision on assumption or rejection of the leases from Coleman.

Coleman sought by adversary complaint a determination that the leases had terminated prepetition. Coleman does not seek review of the determinations of the courts below that the leases had not terminated prepetition. P. i and 17. In 1992, the Debtors gave timely notice of the extension of the terms of the leases for an additional five years.

With respect to defaults claimed to have been in existence in 1992, Coleman first provided specific notice to the relevant Debtors of its payment default claims in the form of the Supplemental Affidavit of Frederick Pettigrew dated September 14, 1993, ("Supplemental Affidavit"), long after the Debtors' exercised their rights to extend. *See* Ex. 5 to Excerpts of Record to Opening Brief of Appellant (to Ninth Circuit) and Ex. S thereto.[1] The noticed payment defaults were limited to taxes for

---

1. Otherwise, with respect to notice, Coleman relied in opposition to the summary judgment motion (Bankruptcy Court Adv. Pro. Docket No. 61, at 14, n.7) only on three unauthenticated letters. *See* Ex. 5 to Excerpts of Record to Opening Brief of Appellant (to Ninth Circuit) and Exs. F, G and J thereto. The first (April 4, 1989, addressed only to NEPD) gives no notice of any of the defaults now

(Cont'd)

prepetition periods on the two OCP stores, prepetition unsecured claims of persons who performed maintenance and environmental work on the same two stores and one of NEPD's, and an alleged postpetition default of approximately $200 (held *de minimis* by the courts below, and promptly paid upon receipt of notice by OCP) at an OCP location, which postpetition default had previously been noticed only to NEPD. *See* Bankruptcy Court Adv. Pro. Docket No. 45.

In March and April 1993, the Debtors filed motions to assume the leases. Those motions were consolidated with the adversary proceeding in which the bankruptcy court granted the Debtors' motions to assume the leases. P.A. 5a. In its ruling from the bench, the bankruptcy court made numerous determinations and set forth the bases for its grant of summary judgment. A. 13a-23a.

Coleman appealed to the Bankruptcy Appellate Panel for the Ninth Circuit Court of Appeals ("BAP") which affirmed in December 1995, P.A. 9a-28a, amended January 1996. P.A. 39a-42a. In dealing with the 1992 renewal, the BAP focused on the interpretation and application of § 365. The BAP stated that there were some pre- and postpetition defaults, P.A. 18a, n.3, but did not deal with: (1) the absence of any showing of specific notice of defaults sufficient to permit Coleman to rely upon any such defaults to preclude extension of the terms of the leases;

(Cont'd)
claimed to have prevented extension of the terms of the leases in 1992. The second (September 20, 1989, addressed only to Jacob Segal with no evidence of his connection to any Debtor) gives only vague notice of a non-monetary maintenance default at the Kittery, Maine location. The third (March 9, 1992, addressed only to NEPD) gives only vague notice of property tax defaults which are claimed only at Durham and Portsmouth (as to which OCP and not NEPD was the lessee).

(2) the relation back of cure of defaults under assumed leases to the petition date (that is, to a date prior to the 1992 extension of the terms of the leases); (3) anti-forfeiture provisions of state law which would preclude Coleman's attempt to reject extension of the lease terms even if bankruptcy law did not prevent it, *see* P.A. 18a, n.4, 41a-42a; or (4) the unenforceability of cross-default provisions in bankruptcy to prevent assumption of leases, which would preclude reversal of the summary judgment as to some stores even if the majority were incorrect as to § 365 and even if there were a genuine issue of fact as to the adequacy of notice of defaults or the application of anti-forfeiture provisions of state law as to those leases as to which defaults were claimed. Under the BAP's view of § 365, applicable to all the leases, it was unnecessary to deal with this multitude of issues.

The Ninth Circuit Court of Appeals affirmed on the same grounds, P.A. 43a-58a, also without dealing with the alternative grounds for summary judgment. It also affirmed for reasons that would make those other issues immaterial. P.A. 54a.

After entry of the summary judgment, Debtors sold the lessee's interests in the leases to parties now known as Gibbs Oil Company Limited Partnership ("Gibbs") and New England Petroleum Limited Partnership ("NEPLP"), with certain indemnification obligations to them with respect to the litigation with Coleman. Stipulated Order entered September 17, 1997, A. 32a-33a. In 1996, Gibbs and NEPLP gave notice of exercise of the purchase options in each of the leases. A. 35a-36a.

The extended term of the leases would ordinarily have expired at the end of November 1997. A. 36a. The transfer pursuant to exercise of the purchase options would ordinarily have taken place at or before the end of November 1997. The parties entered into a stipulated order preserving the lessees' right to retain possession, the obligation to pay rents (without

prejudice to the argument for their application to the purchase prices), and the right to re-exercise the purchase options after that time, if necessary (all without prejudice to Coleman's claims other than with respect to rights which could otherwise terminate with the passage of time). A. 31a-39a. Neither the effectiveness of the order assuming the leases nor the litigation on enforcement of the exercise of purchase options is stayed.

REASONS FOR DENYING THE WRIT

I.

PETITIONER HAS OVERSTATED THE ISSUE IN THIS CASE IN ORDER TO EXAGGERATE BOTH ITS IMPORTANCE AND ANY NEGATIVE EFFECT ON THE COMMERCIAL MARKETPLACE.

This case presents a limited question, partly of first impression under the Bankruptcy Code. There is no split among the circuit courts of appeal on interpretation of 11 U.S.C. § 365 as applied to this case. The question is not one as to any implied general authority of bankruptcy courts to abrogate existing contract rights.

The primary Bankruptcy Code question in this case is limited to whether the § 365 right to cure and the extension of the time to cure defaults by extending the time in which to assume or reject leases without objection by the landlord, preclude that landlord from relying on alleged prepetition defaults to enforce a contractual provision under which the landlord might, in the absence of bankruptcy, avoid an extension of the terms of the leases by reason of such prepetition defaults, when timely notice of extension of lease terms is given postpetition, prior to confirmation of the plan of reorganization, and prior to assumption of the leases.

This case does not, as Coleman suggests, P. 16-17, raise the specter of bankruptcy courts across the nation throwing the commercial market place into paralyzing uncertainty because any contractual provision could be set aside to effectuate the bankruptcy courts' views of the purpose of the Bankruptcy Code. The Ninth Circuit's summarizing sentence which does not by itself explain restrictions on the modification in bankruptcy of alleged contractual rights does not justify Petitioner's hysteria about the marketplace. In fact, the sentence at which Coleman takes offense *does* include language limiting the holding to extension of leases under terms applicable to "the Debtors here". The Ninth Circuit opinion cannot legitimately be read to authorize bankruptcy courts to make unbridled modifications of contract rights based solely on the belief that such modifications would further reorganization.

At least with the adoption of the Bankruptcy Code and its provisions modifying contract rights, including the right to assume or reject, to cure defaults, and the authority of the court to extend the time in which to assume and cure defaults, it cannot be said in this context (*cf.* P. 17), that "the highest public policy is found in the enforcement of the contract which was actually made." *Santa Fe, Prescott, and Phoenix Railway Co. v. Grant Bros. Construction Co.*, 228 U.S. 177, 188-89 (1913). Coleman has ignored important qualifying language in the same sentence. The Court had found in *Santa Fe, Prescott*, under the facts of that transportation fire loss case, that

> [t]here is no rule of public policy which denies effect to [the parties'] expressed intention [in that case], but, on the contrary, as the matter lies within the range of permissible agreement, the highest public policy [in that case] is found in the enforcement of the contract which was actually made.

Id. The part of the sentence quoted by Coleman has no application here, where the Bankruptcy Code *does* embody

policy contrary to the alleged contractual intention and creates rights in the debtors-in-possession in contravention of Coleman's interpretation of the contract provisions.

The facts of this case are not those on which the Supreme Court would best review the issue. It is by no means clear that Coleman could avoid the extension of the terms of the leases under the contractual provisions in question or under state law, even in the absence of a bankruptcy.

There is no genuine issue of fact as to the absence of pre-1992 notice of defaults by Coleman to the lessees sufficient to trigger the cure periods under the leases. New Hampshire law requires that defaults be noticed with specificity if the landlord seeks to terminate the tenancy. *See* N.H. Rev. Stat. Ann. §§ 540:1-a(I), 540:2(I), 540:3(III), and 540:28 (1992 Cum. Supp.) There is no genuine issue of fact as to the *de minimis* nature, under the circumstances, of the payment defaults Coleman wishes to rely on.[2] There is no genuine issue whether Coleman will receive the benefit of its bargain as a result of the assumption of the leases. Accordingly, even under general principles of equity and common law the leasehold estates would not be forfeited by reason of such defaults. Both state law and federal bankruptcy law abhor forfeiture. *Finn v. Meighan*, 325

---

2. Only as to the Kittery, Maine store might there at first blush appear to be an issue under the summary judgment motion whether the alleged default is *de minimis*. (Even that issue would arise only if evidence of sufficient notice of the default had been presented to the bankruptcy court in opposition to the summary judgment motion. It was not.) The alleged default at Kittery is a non-monetary maintenance default, which, not being a payment default, has no contractual cross-default effect upon the other leases. If that alleged prepetition non-monetary default were a basis to prevent extension of the lease term under the contractual language, it would appear to be a penalty provision which is not countenanced by § 365(b)(2)(D).

U.S. 300, 301 (1945); *Fletcher v. Frisbee*, 404 A.2d 1106, 1109 (N.H. 1979); *C Co. v. City of Westbrook*, 269 A.2d 307, 309 (Me. 1970).

Although as a result of the passage of time and events subsequent to the summary judgment, Coleman has received (or will receive upon enforcement of the current lessees' exercise of the purchase options) the full economic benefit of its bargain. The property tax claims (all of which were prepetition) have been paid in full pursuant to the plan of reorganization. Coleman has no exposure to liability for any unpaid portion of the maintenance and environmental work charges. Coleman has already received the rents provided in the leases for the entire extended terms of the leases. Upon enforcement of the exercise of the purchase options, Coleman will receive the full consideration for which it agreed to sell the properties. It will have received the full benefit of its bargain.

Under these facts, and when the issue is properly limited to this case, the primary question is one of ordinary statutory interpretation of Bankruptcy Code provisions which have been in place for some time. There is no reasonable fear of any broad negative effect in the commercial marketplace. The secondary question on affirmance of the summary judgment even if the Ninth Circuit had erred in interpreting the Bankruptcy Code, is an ordinary summary judgment question. There is no compelling reason for the Supreme Court to consider the questions raised by the petition for writ of certiorari.

II.

THE COURTS BELOW HAVE FOLLOWED STANDARD PRINCIPLES OF STATUTORY CONSTRUCTION AND HAVE CORRECTLY INTERPRETED § 365.

A. The courts below correctly construed the right to cure in the context of the Bankruptcy Code as a whole.

Section 365(a) and (b)(1)(A) together provide a right to cure defaults upon assumption of a lease, regardless of any absence of a contractual or state law right to do so. The time frame in which to cure defaults pursuant to that right is governed by § 365(d)(4) and any orders pursuant to that subsection extending the time to do so.[3] The result of assumption and cure of defaults pursuant to the Bankruptcy Code is to reinstate the lease as of the bankruptcy petition date, as if no default had occurred. *In re Sigel & Co. Ltd.*, 923 F.2d 142, 145 (9th Cir. 1991); *In re RB Furniture, Inc.*, 141 B.R. 706, 710-11 (Bankr. C.D. Calif. 1992). Where, as here, there are prepetition defaults invoking the right to cure and the contractual time to exercise a right to extend the term of the lease comes before the Bankruptcy Code authorized time to cure (extended without objection), the provisions of § 365(d)(4) take precedence. The courts below have properly looked to the Bankruptcy Code as a whole to confirm the apparent Congressional intent of § 365. *See Sullivan v. Everhart*, 494 U.S. 83, 89 (1990) (statute to be construed as a whole).

Congress has neither required nor permitted the cure of prepetition defaults prior to assumption of the lease. *See* 11

3. The time to cure is further extended by § 365(b)(1)(A) which allows cure to follow assumption in the event of adequate assurance of prompt cure. In this case, cure of any remaining defaults did not follow promptly upon the assumption only because Coleman did not file the required statement of defaults, P.A. 6a, until August 22, 1997. A. 37a. The cure issues are set for a hearing on February 13, 1998.

U.S.C. § 365(b)(1)(A) and (d)(4). Prior to assumption of a lease and confirmation of a plan of reorganization, a landlord's claims for prepetition defaults cannot be treated differently from other unsecured claims. *See* 11 U.S.C. § 1122 on classification of similar claims; 11 U.S.C. § 1123(a)(4) on providing the same treatment to all claims of each class; 11 U.S.C. § 507 providing for some priorities (but none for the landlord's prepetition claims). In the event of rejection of the lease, the landlord has a prepetition unsecured claim. 11 U.S.C. § 365(g)(1); *see, e.g. In re Pacific Express, Inc.*, 780 F.2d 1482, 1486, n.3 (9th Cir. 1986). The Bankruptcy Code provides no authority for a Chapter 11 debtor to pay prepetition claims prior to assumption of the lease or confirmation of a plan, but does include authority for court orders extending the time to assume or reject (and therefore to cure defaults).

Congressional purpose to hold prepetition claims in abeyance (until confirmation of a plan for their payment, assumption of a lease or executory contract, or grounds for modification of the automatic stay) is also evident in 11 U.S.C. § 362 staying action against the debtor or its property by reason of prepetition claims. Indeed, any postpetition notice of prepetition defaults (such as the Supplemental Affidavit) would itself be a violation of § 362, if such notice had the effect of precluding extension of the lease terms and were thus an act against the leasehold property of the bankruptcy estate. None of the cases cited at P. 11 as to the lack of effect of the automatic stay to prevent termination of a contract by its own terms concern the effect of the automatic stay on alleged prepetition defaults such as those on which Coleman seeks to avoid the timely exercise of the right to extend.

A lease provision which would require postpetition, pre-assumption, pre-confirmation payment of prepetition amounts due in order to avoid a forfeiture of the leasehold interest, as

argued by Coleman, would operate as an *ipso facto* clause in violation of the intent of 11 U.S.C. §§ 363(*l*) and 365(b)(2)(A) and (B). The Court should not countenance Coleman's unnecessary interpretation of the statute which would frustrate the priority scheme of the Code and Congressional purpose of avoiding forfeiture or termination of property interests by reason of the filing of the bankruptcy petition.

None of this requires treating private contract rights lightly. During the postpetition extended terms of the leases Coleman received, before and after extension of the leases, all postpetition rent and other obligations accruing postpetition. The Ninth Circuit's interpretation of § 365 in this case does nothing to prevent the landlord's receiving the full benefit of its bargain. *See* subpart E below.

Coleman's interpretation, however, would require treating the bankruptcy court's § 365(d)(4) authority to extend time to cure as illusory in this context. Respondents submit that Congress cannot have intended to grant illusory authority. Indeed, Congress specifically provided for bankruptcy court power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). There is no exception to that § 105 authorization which would limit the bankruptcy court's authority to carry out § 365(d)(4).

B. Coleman misapplies the principle: *expressio unius est exclusio alterum.*

Coleman purports that Congress' specific invalidation of *ipso facto* clauses, authorization of rejection of an entire executory contract, imposition of the automatic stay, and creation of the right to cure defaults in connection with assumption, render any other modifications to contracts

impermissible (under the maxim of "the expression of one thing is the exclusion of another"). P. 8-10.

Here, however, the right to cure defaults is at the heart of the dispute. Debtor's right to cure defaults upon assumption is granted by 11 U.S.C. § 365(a) and (b)(1) and defined in part as to timing by 11 U.S.C. § 365(d)(4). Congress' not explicitly describing all the situations which the extension of time to cure could affect does not somehow make the one situation at issue here a different kind of thing from the right to cure. It is merely an instance of the application of the right to cure within the time provided by the Bankruptcy Code.

Further, assumption of an executory contract (including the required cure of defaults) "repeal[s] the contractual consequences [of the default]." *Sigel & Co. Ltd.*, 923 F.2d at 145 (citing *In re Taddeo*, 685 F.2d 24, 27 (2d Cir. 1982)). Assumption of a lease reinstates the provisions of the lease "as of the petition date." *RB Furniture, Inc.*, 141 B.R. at 710-711. The Bankruptcy Code grants a right to assume leases and cure prepetition defaults, thereby nullifying any contractual consequences of those defaults. This right and the right to make the assumption decision within the time permitted by the Code would be meaningless in this situation if Coleman's interpretation of the statute were correct. *See United States v. Menasche*, 348 U.S. 528, 538-39 (1955) ("The cardinal principle of statutory construction is to save and not to destroy," citing *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937)).

Unlike the instances cited by Coleman for limitation of the right to assume and cure by the maxim of *expressio unius est exclusio alterius* (P. 10), the Bankruptcy Code specifically provides:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.

11 U.S.C. § 105(a). The authority granted by § 105(a) is very broad. *See United States v. Energy Resources Co.*, 495 U.S. 545, 549 (1990). "[B]ankruptcy courts, as courts of equity, have broad authority to modify creditor-debtor relationships." *Id.* Moreover, because § 105(b) contains a single exception to the authority of § 105(a), were one to follow Coleman's method of applying the maxim, there could be no exception to the authority of a bankruptcy court to issue an order to carry out the provisions of § 365(a), (b)(1) and (d)(4), other than the prohibition of the appointment of a receiver. (The expression of a single exception would preclude the existence of other exceptions.)

C. Coleman's misapplies the general principle that the leases must be assumed with their burdens intact.

Coleman's use of the general principle "that a debtor cannot elect certain terms it desires to assume and reject others", P. 12, is beside the point. The Bankruptcy Code question here is whether there is an exception to that generalization created by § 365. Some exceptions to that generalization are explicitly stated in the Code, § 365(b)(2). There are also exceptions necessarily implied by the Code, *e.g.*, delay in performance of prepetition obligations until assumption of the contract or confirmation of a plan calling for their payment. Citing the general principle for Coleman's implicit proposition that there are no exceptions is futile.

The more accurately stated principle is that *material* obligations owing to the non-debtor contracting party may not be excised by the debtor or the bankruptcy court without consent

(or failure to object to extension under § 365(d)(4)). *See City of Covington v. Covington Landing Limited Partnership*, 71 F.3d 1221, 1226 (6th Cir. 1995). This does not preclude their modification by Congress. It does not preclude the effect of § 365 on a provision Coleman now claims is material where the effect results from a Code-authorized extension of time which Coleman apparently deemed immaterial enough not to bother to object.

The general principle also has no application where the alleged obligations are prepetition claims which are to be paid in connection with assumption. In the bankruptcy context, any right to payment of prepetition unsecured claims *at a particular time* is not a "material" right of contracting parties. The delay of such payment is common to all such creditors. Coleman's argument on *cum onere* assumption simply begs the question whether Congress has provided a right to cure and a mechanism for establishing the time in which to do so which overrides contracts which might lead to a contrary result.

D. Coleman has misread the plain language of § 365(d)(3).

Coleman relies, P. 13-16, somewhat ironically[4], upon the statement of the "plain meaning" rule in *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989). That "plain meaning" rule, properly applied to § 365(a) and (b)(1), leads to the result reached by the Ninth Circuit. Section 365(d)(3) is irrelevant to that result. Coleman tries to make it relevant by sleight-of-hand.

Coleman emphasizes one phrase of the statute (*i.e.*, ". . . trustee shall timely perform all obligations of the debtor . . .",

4. The irony is that Justice White joined in the opinion of this Court in *Ron Pair* and in the Ninth Circuit majority opinion criticized by Coleman.

P. 14, while ignoring another critical phrase of the same provision: ". . . *arising from and after* the order for relief . . .". *See* 11 U.S.C. § 365(d)(3) (emphasis added). The consideration of only one phrase of the statute in isolation from the remainder as suggested by Coleman has no place in the jurisprudence of statutory construction. *Sullivan v. Everhart*, 494 U.S. 83, 89 (1990).

The plain meaning of § 365(d)(3) is that, prior to assumption or rejection, debtor lessees must pay landlords all lease obligations arising postpetition (except those set out in § 365(b)(2)). Any obligation which arose before the filing of the bankruptcy petition is not subject to § 365(d)(3). *See, e.g., Paul Harris Stores v. Mabel L. Salter Realty Trust*, 148 B.R. 307, 313 (S.D. Ind. 1992) (courts award lessors "post-petition, pre-rejection rent").

Coleman's clever but inappropriate sleight-of-hand occurs, when it exchanges Congress' term "obligations" for Coleman's own term "post-petition conditions for extending the lease term". P. 15. Coleman wants to use § 365(d)(3) to convert prepetition defaults into postpetition ones, and then suggest that Debtors' failure to pay the prepetition defaults prior to obtaining any authority to do so violated the § 365(d)(3) requirement of paying postpetition lease obligations as administrative expenses. P. 14.

However, the language of the leases conditioning extension of their terms on the absence of certain defaults is not an "obligation" which "ar[o]se from and after the order for relief". There has been no dispute that (with the exception of a *de minimis* alleged postpetition default) all of the claimed defaults are prepetition claims. There is nothing in the language of the statute to suggest that it permits or requires such a transformation of prepetition default into postpetition defaults, nor has *any* court applied such an interpretation. Moreover, nothing in the

limited legislative history for § 365(d)(3) supports Coleman's position.

The courts are in agreement that § 365(d)(3) acts to *equalize* the position of landlords with other creditors who provide service postpetition, not to create superpriority claims for the landlord, particularly as to prepetition claims. *In re Handy Andy Home Improvement Centers, Inc.*, 196 B.R. 87, 95 (Bankr. N.D. Ill 1996); *In re Ernst Home Center, Inc*, 209 B.R. 955, 964 (Bankr. W.D. Wash. 1997) (provision "does not accord landlords a windfall by paying a prepetition portion of their claim ahead of other unsecured prepetition creditors"); *In re Amber's Stores, Inc.*, 193 B.R. 819, 824 (Bankr. N.D. Tex. 1996) ("lessor has an administrative expense claim for unpaid *postpetition* lease obligations . . ." (emphasis added)).

> The general rule is that all administrative expense creditors must be treated with absolute equality unless a creditor agrees to subordinate its claims or unless the Code specifically provides otherwise.

In re MS Freight Distribution, Inc., 172 B.R. 976, 980 (Bankr. W.D. Wash. 1994), *citing In re Cochise College Park, Inc.*, 703 F.2d 1339, 1356 (9th Cir. 1983). "Where Congress has intended to alter the priority scheme established under Section 507, it has done so explicitly". *Id.*; *see also*, *Handy Andy Home Improvement Centers*, 196 B.R. at 95. As explained in detail by the court in *Handy Andy Home Improvement Centers*:

> Landlords are a uniquely situated class of creditors. A landlord, obligated under a pre-petition lease until rejection or assumption, is forced to continue its relationship with the debtor until the lease is rejected or assumed. * * * Congress, via § 365(d)(3), has sought to *equalize* their position. Section 365(d)(3)

> requires timely payment for current services so as to put the landlord into the position of a post-petition supplier who demands a cash payment. However, just as a supplier cannot coerce payment of the pre-petition claim, so too the landlord is placed into the position of receiving timely payment *only for current obligations. To imply more is to go beyond the plain language of the 1984 Amendments.*

196 B.R. at 95 (emphasis added).

Resort to the legislative history is typically not suitable in "plain meaning" analysis. *See Ron Pair*, 489 U.S. at 241. Coleman, however, refers to the history, P. 14-15, but overlooks Senator Hatch's statement of purpose for § 365(d)(3). Put in better context, the Senator set forth the existing problem the statute sought to remedy as follows:

> . . . during the time the debtor has vacated space but has not yet decided whether to assume or reject the lease, [under the pre-1984 Amendments law] the trustee has stopped making payments due under the lease. * * * In this situation, the landlord is forced to provide *current services* — the use of its property, utilities, security and other services — without *current payment*. No other creditor is put in this position.

H.R. Rep. No. 882, 95th Cong., 2d Sess. 1984, reprinted in *1984 U.S. Code Cong. & Admin. News* 576 (emphasis added). The clear purpose behind § 365(d)(3) was to provide landlords during the pre-assumption/rejection period with the same right to compensation afforded other postpetition creditors:

> Congress sought only to ensure that landlords received "current payment" for "current services"

> provided. * * * Congress enacted § 365(d)(3) to guarantee that landlords would not be placed at a disadvantage for providing post-petition services to the debtor. Put another way, Congress intended to put landlords on an equal footing, not to grant them a windfall at the expense of other creditors.

In re Best Products, Inc., 206 B.R. 404, 407 (Bankr. E.D. Va. 1997). No court has published a finding of legislative intent which conflicts with that found in *Best Products*. Congress did not intend to provide an otherwise unstated superpriority as to prepetition claims of certain landlords as a result of conditional extension provisions in a lease.

Finally, Coleman's illustration at P. 16 is inapposite. This is not a case of failure to give timely notice of exercise of a renewal option. The decision in *In re Crabb*, 48 B.R. 165 (Bankr. D. Mass. 1985) was based on the expiration prior to notice of both the time to give notice and the time to assume or reject, not on the prepetition defaults. There were also postpetition rent defaults. *Id.* at 166-68. If notice of extension were not timely and the lessee were in long standing rent payment default as in *Crabb,* the landlord could reasonably assume and rely upon the assumption that once the time to give notice had passed the lease was terminated. In this case, Coleman was given timely notice of renewal and continued to receive postpetition rents. Coleman could make no reasonable assumption inconsistent with the Debtors' intention to continue the leases pending their assumption or rejection. There has been no postpetition failure on the part of Debtors which violates § 365(d)(3). Coleman's argument must fail under the "plain meaning" rule and its argument finds no support in the legislative history of § 365(d)(3).

E. Coleman has received (or will receive upon its compliance with the exercise of the purchase options) the full benefit of its bargain as made in the leases it freely entered into.

Coleman has no legitimate complaint about losing the benefit of its bargain. As noted above, the prepetition property tax claims have been paid in full pursuant to the plan of reorganization; Coleman has no exposure to liability for any unpaid portion of the maintenance and environmental work charges; Coleman has already received the rents provided in the leases for the entire extended terms of the leases. Upon enforcement of the exercise of the purchase options, Coleman will receive the full consideration for which it agreed to sell the properties. At that point, having no further interest in the properties, Coleman has no interest in their value or condition. It will have received the full benefit of its bargain.

The only complaint Coleman will have is that it was not permitted to enforce a forfeiture of the leasehold interest after 1992 (for which extended term Coleman has already been paid all required rent) by reason of alleged prepetition defaults in order to cause a forfeiture of the purchase options and avoid the burdens of its bargain. Even outside of bankruptcy, Coleman would not, on the record presented on the summary judgment motion, have been permitted to enforce such forfeitures.

In any event, cases involving "benefit of the bargain" and § 365, focus on curing of defaults. A cure:

> effect[s] a total healing of the scars of contractual default, by placing the parties into the same position they were in immediately before the default occurred. This healing is accomplished *by paying the creditor whatever monies he would have received* under the contract had the debtor not defaulted. . . . [*The*

> *creditor] is thereby given the full benefit of the original bargain.*

In re Forest Hills Assoc., 40 B.R. 410, 415 (Bankr. S.D.N.Y. 1984) (emphasis added).

Coleman is not entitled to enforce a forfeiture based on prepetition defaults under the guise of its being part of the bargain when the curing of defaults will provide Coleman with the full economic benefit of its bargain. The only disruption of the bargain made by Coleman is the same delay in time which is shared by other creditors with respect to payment of prepetition unsecured debts. Coleman's argument that it is somehow entitled to more is meritless.

Further, a hearing on cure of any defaults is scheduled February 13, 1998. Coleman's argument that cure of defaults will not provide it with the full benefit of its bargain is at best premature. Finally, Coleman's reliance on the legislative history for § 365(e) regarding *ipso facto* clauses and the need to provide landlords the "full benefit of the bargain", P. 8, is misplaced. First, subsection (e) is not at issue. Second, as this Court has recognized in *United Savings Ass'n of Texas v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365, 379-80 (1988), generalizations such as "secured creditors should not be deprived the benefit of their bargain" are "inadequate to overcome . . . plain textual indication . . .". The plain indication of the Code is that Coleman may not enforce a forfeiture of the Debtors' interests in the leases by reason of prepetition defaults which Debtors have a right to cure upon assumption of the leases in the time permitted by § 365(d)(4) as extended (without any objection by Coleman).

F. The summary judgment should be upheld in whole or in part, even if the courts below erred as to § 365.

There is no genuine issue of fact with respect to insufficient prepetition notice of defaults to invoke the cure periods of the leases or to avoid anti-forfeiture provisions of state law. Except for the cross-default provision as to payment defaults only, there is no allegation of default under several of the leases. Such cross-default provisions are unenforceable in bankruptcy to prevent the assumption of individual leases. *See In re Braniff, Inc.*, 118 B.R. 819, 845 (Bankr. M.D. Fla. 1989); *In re Mr. Grocer, Inc.*, 77 B.R. 349, 354 (Bankr. D. N.H. 1987); *In re Sanshoe Worldwide Corp.*, 139 B.R. 585, 597 (S.D.N.Y. 1992), *aff'd*, 993 F.2d 300 (2d. Cir. 1993); *In re Sambo's Restaurants, Inc.*, 24 B.R. 755, 757-58 (Bankr. C.D. Cal. 1982).

If the Petition were granted and, in the unlikely event that this Court found the Ninth Circuit in error as to the interpretation of § 365 under which all these issues became immaterial, this Court should then review the summary judgment and affirm, nevertheless. Summary judgment may be affirmed "if any proper ground exists to support the [original] court's ruling." *Lindsey v. Dayton-Hudson Corp.*, 592 F.2d 1118, 1124 (10th Cir.), *cert. denied*, 444 U.S. 856 (1979).

CONCLUSION

Petitioner has submitted an overbroad statement of the issue and argued for misapplication of the "plain meaning" rule while purporting incorrectly that the Ninth Circuit failed to follow rules of statutory construction. There is no compelling reason to grant the Petition. For the reasons given above, the Petition should be denied.

Respectfully submitted,

JAMES L. RASMUSSEN*
JAMES T. REIST
KEMP, SMITH, DUNCAN
& HAMMOND, P.C.
500 Marquette N.W.
Suite 1200
Albuquerque, NM 87102-2121
(505) 247-2315

Attorneys for Respondents

* *Counsel of Record*

APPENDIX

APPENDIX A — TRANSCRIPT OF PROCEEDINGS DATED MARCH 17, 1995

THE UNITED STATES BANKRUPTCY COURT
DISTRICT OF ARIZONA

90-050S2-PHX-GBN
ADV. 91-00974

In Re.

CH. 11

THE CIRCLE K. CORPORATION COLEMAN OIL COMPANY, INC.,

vs.

THE CIRCLE K. CORPORATION

MOTION FOR SUMMARY JUDGMENT BY DEBTORS/DEFENDANTS

U.S. Bankruptcy Court
230 N. 1ST AVE., ROOM 5000
Phoenix, Arizona 85025

March 17, 1994
9:30 a.m.

BEFORE THE HONORABLE GEORGE B. NIELSEN, JR., Judge

APPEARANCES:

Appendix A

For the Debtor: James L. Rasmussen
James T. Reist
KEMP, SMITH, DUNCAN, & HAMMOND
PO Box 1276
Albuquerque, NM 87103

For Coleman Oil Co.: Carolyn J. Johnsen
HEBERT, SCHENK & JOHNSEN
1440 E. Missouri Ave., Suite 125
Phoenix, AZ 85014

THE CLERK: 90-05052, the Circle K Corporation; adversary 91-974, Coleman Oil v. the debtor; motion for summary judgment by debtors/defendants.

MS. JOHNSEN: Carolyn Johnsen on behalf of Coleman Oil Company. Your Honor, we've substituted in for Coleman from Jim Marlar and Melinda Barnett.

MR. REIST: Your Honor, James Reist for the debtors/defendants, and James Rasmussen.

THE COURT: Okay. Lady and gentlemen, I've reviewed the papers. I'm prepared to make a ruling on the defendant's motion for summary judgment at this time. Before I do so, however, I'll inquire if there's any — anyone wishes to add to their particular papers. Mr. Reist?

MR. REIST: Thank you, Your Honor. Your Honor, generally we believe we have replied sufficiently to Coleman's response to — enough to allow the Court to enter a summary judgment. However, yesterday afternoon we received a fax from Ms. Johnsen of a statute, which was not raised in the response,

but which she indicated Coleman was intending to raise today; a New Hampshire statute from Chapter 477, Section 15. And if Your Honor will allow, I'd like to respond to that particular statute very briefly.

THE COURT: All right. Perhaps what we should do, I'm not aware of the statute, so perhaps what we should do is invite Ms. Johnsen to tell us if she's inclined to utilize the statute as part of her argument here today. And it so, I'll attempt to resolve the matter. I'm not prepared on the statute, however, so I may have to take — either continue this hearing or take a matter under advisement, depending upon what the parties want to do. Ms. Johnsen?

MS. JOHNSEN: Your Honor, I don't think that the statute particularly changes our argument. It is an additional part of the statute of frauds argument. The statute indicates — or it talks about an oral conveyance, and I have a copy of the statute here. For the record, it states that every estate or land created or conveyed without an instrument in writing signed by the grantor or his attorney shall be deemed an estate at will only, and no estate or interest in land shall be assigned, granted or surrendered except by writing signed as aforesaid, or by operation of law. And I believe the statute just simply ties in directly to our statute of frauds argument, which is contained in our response. I'd be willing to hand this copy up to the Court. I've already provided it to opposing counsel.

THE COURT: All right. I'll take a bench copy of the statute. And although we've managed to reverse positions here, I will inquire if there's anything further you'd care to add on behalf of Coleman.

MS. JOHNSEN: Your Honor, I think the main thing that I

would add is in response to the reply that was filed last week by the debtors. And throughout their reply the debtors seem to indicate that it's Coleman's obligation to produce some kind of evidence that shows that there was not an assignment. And I think we're looking at this entire situation backwards.

The debtors are the movants here. And they need to indicate to you — this is a motion for summary judgment — that there are indeed no fact questions and that they can satisfy their burden, as a matter of law, that they are the lessees of these six leases. And I think that in our pleadings, we demonstrated that they just simply cannot satisfy that burden. There are too many factual questions in addition to questions of law that they cannot meet that burden.

I think — we've divided our arguments into essentially four separate sections. The first one is, I think, the one that demonstrates the numerous factual questions that exist. And I don't want to rehash my pleadings, but I would just point out a few things. The debtors seem to think that NEPD — and I hate to use all these initials, it gets rather confusing I understand — but NEPD, which claims to be one of the lessees, ended up with these leases by some sort of absorption process.

The fact of the matter is, there's nothing in the record that demonstrates how they became the lessees or the assignees of these leases. And in fact the evidence shows to the contrary. If you look at Mr. Welch's affidavit, which the debtors rely on, indicates that NEPD was exercising operational control. They never even admit, in the Welch affidavit and the letter that's attached to it from that particular attorney, that they were the lessee, or they were the assignee. They simply say NEPD was exercising operational control.

Appendix A

Later on, when NEPD attempts to exercise the option to renew the leases, NEPD attempts to exercise it with respect to all six, yet it's only claiming to be the assignee of four of the leases, whereas OCP, another entity, is claiming to be the assignee of two of the leases. That, in my mind, raises a huge factual question.

All right. Are they exercising operational control over all six leases, or only four leases? If that's the case, why did they try to exercise the option with respect to all of them? There's nothing in the record that shows that NEPD actually acquired the leases. Each and every document that the debtors have cited say NEPD was formed to hold assets. That's what the Welch affidavit says, hold assets including the four stores. We don't know how it was created. We don't know whether the leases were actually assigned. We don't have any of that — those documents. And it's their burden; not Coleman's burden. It's their burden.

I think one of the most telling things in the — in this entire file is the assignment, the retroactive assignment, which attempts to retroactively assign the leases to NEPD. And this occurs in 1992. And if you look at that document, it says that, in one of the recitals:

> "Whereas the assignor, Charter International Oil Company, represented that NEPD was the lessee, and whereas this assignment, this retroactive assignment, will now make that representation accurate."

Isn't that an indication that there wasn't an actual assignment that occurred? Isn't that an actual admission that there was no assignment?

These kinds of questions are raised in all of the pleadings. And what the debtor's answer to that is, "Well, it was our intent." Well, I don't think you can resolve intent of the parties on a motion for summary judgment. Now perhaps it can all come out in trial, but certainly not this stage of the pleadings.

The remainder of our argument on the statute of frauds and the statute that I've just given you, I think is pretty clear. The debtors seem to think that — all right, look Coleman, you had a provision in your lease that you didn't require any notice for an assignment of the lease. And so you didn't do that, and now you don't have any standing to raise the statute of frauds.

Well, I mean let's look at this from a practical standpoint. If the purpose of writings, when you're conveying interest in real estate, is to avoid fraud, then this is the exact situation that requires a writing. Not that there's fraud involved here, but supposing you were looking to someone to pay the rent and they didn't want to pay the rent, and they said, "Well, we assigned that lease to Joe over here." And what's the first question you're going to ask? "Where's the writing?" That's what you're going to say. And in order to convey that, that's why there is a statute of frauds, so that conveyances in real estate are not fraudulently done; so that somebody's not trying to escape obligations.

And here it's the same kind of situation. All we want to know, all Coleman wants to know is who are we dealing with. Is there an actual chain of assignment. And in this case, we've got — corporate mergers, we've got formations of new entities, we've got a situation at one point where Coleman writes a letter and says, "You know, by gosh, Circle K, if you're going to be — you know, we don't know who you are. We don't know

whether you're the actual lessee or an ssignee, but by gosh, you should assume these obligations under these leases." And there's no response. So it's sort of like they're hedging their bets.

NEPD only exercises operational control over the lease. That's what all the documents say. And Circle K never actually assumes the obligations under the lease. But now that we're in bankruptcy, Circle K wants to assume those leases and wants to say, yeah, we're actually an assignee. And I think there are some real problems there with statute of frauds.

The last two arguments, Your Honor, that we've raised are the expiration pre-petition. And I think this agument is just crystal clear with the retroactive assignment. They come up in 1992 and they say, "Look, we didn't think we actually assigned it when we said that we assigned it, so now in 1992 we're going to retroactively sign it and make all of those representations accurate." Well — and that assignment is going to be effective in 1988, a year after they would have had to exercise the first option. Coleman never, at any time, accepted them — accepted any of these new entities as a lessee; stated, you know, sure, we're not going to waive any of our rights, we're going to accept rent but we're not waiving any of our rights. We don't know who you people are.

And it seems to me that if you go through the machinations of doing a retroactive assignment in 1992, to make your previous representations accurate, then there wasn't an initial assignment. And in that case, those leases would have expired pre-petition, because the option, the exercise of the option, would not have been valid, because they were not the proper party to exercise that option.

Appendix A

And finally, Your Honor, we've also argued that even if somehow you can get to the point at the summary judgment stage that they were the actual lessees and the actual assignees of these leases, we think that the leases have expired post-petition. The argument there, and I — we've cited it in our brief, and I think the case is pretty telling; it's the *Revco* case.

And *Revco*, and in many other cases, talk about the fact that you can't just toss contract provisions out the window because you're in bankruptcy. And the only stumbling block we have reached in this particular case is that in order to exercise the option to renew, which came up post-bankruptcy, we've argued that the debtors had to actually cure before they were able to exercise their option. And that was because of the provision of the lease which requires timely notice of the exercise of the option, and it requires that the lessee not be in default.

And I think you have to look at that option provision as a separate provision, and as almost a stand-alone provision of the lease. It's a condition precedent. The lessee doesn't get to go on with the lease unless it satisfies those conditions precedent. The *Revco* case upholds that and says, well, you know, if you have a situation like that where there's an option to be exercised post-petition, and there are defaults which must be cured, then you're not permitted to just simply disregard those conditions precedent, so long as the lessor has taken some affirmative step — in that particular case it was a motion to require the assumption or rejection of the lease — but some affirmative step to demonstrate that you want the lessee or the debtor to assume or reject that lease; that you want them to go forward with a cure.

And in *Revco*, the court held that if that — if the creditor

files that kind of motion or takes that kind of step, then the letter of the contract, or the lease agreement, is to be read, you know — to be read to the letter. It's supposed to be interpreted exactly as it's written. And in this case, I think that we've got to get past the idea of just simple cure under 365 and look at the option as a separate provision.

If that's the case, this debtor failed to cure prior to exercising their option to renew. They were in default, which makes that option to renew invalid, and the leases expired then, post-petition. So if —

THE COURT: Ordinarily, of course, Ms. Johnsen, cure of pre-petition default on a lease of nonresidential real property doesn't have to occur until the debtor decides to assume the lease. And that's the practice of the code.

If your theory is correct, then any landlord — and landlords are the ones who typically draft leases. Any landlord could defeat that provision of federal law, could it not, by simply providing that if there's some desired options, the — to extend those options could not be exercised until there's a complete cure of any delinquencies. And then what would occur in bankruptcy would be that there would be a cure of the pre-petition debt of this particular creditor, even if later on the debtor decided not to assume the contract?

MS. JOHNSEN: I think that while it may seem a harsh result, in the instance where an option is contained within the lease, I think that requiring a cure before having—or before exercising that option is a viable result. Because I think you have to look at the option as a separate—almost a separate part of the contract. It is a separate part of the contract. It's a

condition precedent. And that makes it different from a standard contract in which the debtor is allowed to cure pre-petition default before assuming the lease.

And while it does require the debtor to go forward and cure at a time when perhaps the debtor has not made that decision to assume or reject, I think that the code didn't intend to toss out or eliminate contractual provisions. And what would happen is you'd be rewriting that contract. And you'd be saying, "Well, you know, I realize you have to satisfy the condition precedent, but you don't have to do that because you're in bankruptcy, so I'm going to rewrite that part of the lease and I'm going to give you an additional two years."

And that's what's happened here. Because you're rewriting that condition precedent and then giving them an initial — extra time. And I don't think that that's what was intended by Section 365. And that's why I think an option contract is different, and has been treated differently under the code.

THE COURT: Don't we often, in effect, rewrite leases when we allow, as an example, we allow a debtor to assume a lease and then immediately assign it to some other party? That's a, in effect, rewriting a — the lease, is it not, because a stranger then becomes a party to the lease.

MS. JOHNSEN: Well, I understand the Court's argument, but I don't think that being able to assign the lease actually rewrites the actual provisions of the lease. Yes, you have a new entity, but even in assigning the lease, the debtor is put to a pretty strict burden, under the code, of being — it — being able to satisfy business judgment and any other number of tests in being able to assign that lease. So there is some governing

provisions, but the actual itself is not rewritten. And in this case I think that's what would happen.

THE COURT: Understand. Counsel, anything to add to the movant's papers?

MR. REIST: Yes, Your Honor. Your Honor, we believe that we have provided uncontroverted evidence on each of the matters necessary for the debtors to show in order to obtain summary judgment. We don't believe that the opinions and conjectures of Coleman Oil Company are sufficient to make those statements in debtor's papers somehow suddenly controverted.

We want to make clear too, that NEPD — Coleman has attempted to lump all these entities together. NEPD was the assignee given in 1992 and 1990 — '87, 1987, of four of the stores. Old Colony Petroleum was the assignee with respect to two. There's a clear line of papers and through the liquidation papers and merger papers, and the actual lease assignment to OCP, to show that OCP is the assignee of those.

We feel in the case of NEPD, New England Petroleum Distributors, that those mergers, the plan of liquidation, and then the assignments between companies that were wholly owned by one another or were subsidiaries of the parent, where the leases were assigned in between those companies is clear.

We also take issue with a statement about the affidavit of Mr. Welch. Paragraph six of that affidavit says:

"NEPD came into possession of and became the

lessee assignee of the following stores prior to March 9, 1987,"

and the four NEPD stores are listed there.

Coleman makes a big issue about the retroactive assignments in 1992. And we submit that those are really only evidence of one thing. In 1991, when Coleman filed this adversary, they insisted that Circle K, or actually NEPD and OCP, produce written documents to prove the assignment. NEPD and OCP were not able to locate those written documents. Or I should say NEPD was not able to, for the final assignment to them. And this was an effort in 1992 to meet a concern that Coleman Oil Company had raised.

Additionally the — Coleman has indicated that the intent of the parties is not material here, but we've gone far beyond showing intent. We've shown actions on the part of NEPD, of OCP, and the parties who assigned them. NEPD and OCP are in possession of the stores. They have been paying rent on the stores. They've been acting as a lessee and as an assignee.

We also believe that our reply and motion and brief in support of the motion show that a third party is — who is not a party to the assignment or the contract cannot raise the statute of frauds. Coleman Oil Company could have made a written assignment a part of the lease, making a requirement within the lease. It chose not to, for whatever reason. And we do not think that they can come back now and say that an assignment, for which they were — with which they were not a party — to which they were not a party, is something that they can object to.

We think that the new statute raised today is nothing more than another statute of frauds provision that was indicated in the case of *Gowing v. Bell*, which is at 96 N.H. 361, in which that court, the Supreme Court of New Hampshire, recognized that provision as another statute of frauds provision. We believe our arguments at pages six and seven of our memorandum brief in support of defendant's motion clearly handle that problem.

Finally, a great deal is placed by the — by Coleman in the *Revco* case. We think that that case can be distinguished, Your Honor. In that case, the lessor was not seeking a declaratory judgment that the leases had terminated pre-petition, as is the case here. In that case the lessor was merely trying to expedite the decision of the debtor as to whether the debtor would assume or reject the lease. Believe that that's clearly a different situation and that Coleman's representation of how broadly *Revco* applies is simply not correct.

And finally, Your Honor, we also would submit that the code does not provide for a super priority created for the benefit of lessors in circumstances like this. And we do not believe that there is anything within the code that would suggest that that type of priority should be given to a lessor simply because it places an option in its lease. Thank you, Your Honor.

THE COURT: I'll make a ruling now concerning this matter. Anyone who wishes a complete copy of my ruling, my reasons therefor, may obtain it by contracting with the court technician, thereby obtaining a tape or a transcript of this hearing.

This is — this hearing has been oral argument on a motion for summary judgment filed by a defendant to an adversary

case. The adversary is number 91-974. The plaintiff is the Coleman Oil Company, Inc , which is a creditor in a Chapter 11 jointly administered bankruptcy case entitled the *Circle K Corporation*, that those debtors are listed as the defendants in the adversary proceeding.

The litigation itself reflected in the adversary proceeding deals largely with certain rental properties that are currently being operated in the northeastern portion of the United States. They're operated by the debtors, or by subsidiaries or successors of the debtor, as convenience stores. The ultimate decision here is, among other issues, is whether or not an assumption should be allowed of these executory commercial leases.

So the critical argument between the parties in this summary judgment motion relates to whether Circle K, or other entities — I'm going to follow counsel's practice, incidentally, by using initials here because of the large number of interlocking corporate bodies we have. The critical argument relates to whether Circle K, NEPD or OCP were formally assigned the leases. However, on the particular facts of this particular case, it doesn't appear to me, as a matter of law, that a formal assignment was required before a related entity would have the right to extend the lease. And here's why I think so.

It is true paragraph 11 gives the lessee the right to assign the lease, or any extensions, provided the lessee shall remain primarily liable. Now this provision in paragraph 11 does mean that absent a formal assignment from the lessee to another, that the subsequent entity would be unable to exercise the extension clause of the lease. For one reason, the — one reason for this conclusion is that's not what the paragraph says.

Appendix A

The lease agreement itself specifically notes that the lease is binding upon the parties and their successors and assigns. See again, paragraph 11. The term lessee itself is specifically construed to include successors and assigns. See paragraph 21 of the lease. Paragraph 2(a) — strike that.

Paragraph 28(a) provides:

> "1) The word 'lessee' shall mean lessee and their respective successors and assigns."

And number two, it provides that as —

> "Except as provided otherwise, the agreement shall be binding upon the lessee and its successors and assigns."

So accordingly, it's clear by the express language of the lease document that an assignment, at the very least, was contemplated by the parties. However, a formal approval does not appear to have been required.

There is substantial evidence in this case that the entities NEPD, OCP and Circle K are the successors of the original lessee. Now the affidavit of Mr. Paul Welch, the president of NEPD since 1983, states that four stores came into NEPD's possession prior to March 9th of 1987. He states that on March 9th of 1987, NEPD informed plaintiff that NEPD was exercising its rights to extend the term of these four stores, as well as two others. And as a matter of fact, this latter point was conceded by Plaintiff Coleman in its earlier motion for summary judgment. See Statement of Facts Number 12 to that motion, which is document number 19 in the adversary file.

Appendix A

Coleman states it was unaware of NEPD's status as an assignee of Pickering, and did not know nor question whether NEPD had authority to extend the leases. See the earlier statement of facts again, at statement 16. However, Coleman accepted payments on the six stores. Coleman later wrote a letter to Circle K and NEPD indicating it would accept payments without prejudice to question Circle K's status as an assignee.

Now it's clear that although the landlord chose not, in the lease, to make a particular issue or establish very rigorous requirements concerning assignments, the landlord is now quite concerned over the proprietary — the propriety of the assignments. Indeed in the litigation, and in its defense to summary judgment, Coleman's entire focus has been on the paper trail. That is, Coleman's concerned whether a formal assignment was executed prior two exercising an extension under the lease.

I believe this focus, as a matter of law, is unduly narrow, and is frankly unsupported by the lease that was negotiated between these parties or their predecessors. Since the lease would inure to the benefit of successors of the lessee, as well as to its assigns, as indicated, it's clear to me that the parties easily contemplated the possibility of an assignment. And as I indicated, the notice of the requirements imposed on the tenant in case of an assignment do not appear to be particularly burdensome. That indicates to me that the landlord was not particularly concerned.

I think as well that the statute of frauds defense is misplaced here. It's clear that Coleman is a stranger to the assignment. Coleman did not even require notice of assignment in the lease. The agreement allowed the right to assign the

lease upon such terms as the lessee should feel would be best. Again, see paragraph 11.

Third parties cannot assert the statute of frauds as a defense to an action by the direct parties to a contract. This is because the statute of frauds is a shield, not a sword. The statute is intended to prevent fraud by one of the contracting parties on the other. If those parties recognize the contract, the protection of the statute is unnecessary. The legal relations created by the contract, although maybe technically unenforceable, regardless, they can be given effect without violating the protection of the statute. See a — this principle is exhibited in a state case, *Chapman v. Ford*, 227 A.2d 26, at page 31.

Now plaintiff admits that NEPD and OCP submitted notices of the exercise of the first extension in 1987 within the time set by the agreement. Plaintiff admits it received notices of the second extension from NEPD and Old Colony Petroleum on March 5th of 1992 and March 31st of 1992. The deadline for giving notice was May 21st of 1992. The debtors argue the leases did not require Pickering, or its successors, to notify or obtain consent for any assignment of the lessee's interest, nor do the leases require the lessee to provide plaintiff with a proof of assignment. And plaintiff admits it has continued to accept payment from the debtors.

In addition, the debtors state the following facts are relevant in showing the chain of ownership. Number one, the stock of NEPD and OCP has been owned by NPI Corporation; number two, Circle K acquired 100 percent of the stock of NPI Corporation, and of NPI's interest in NEPD and OCP pursuant to a purchase agreement of May 6, 1988.

Appendix A

The debtor notes that Pickering, Pickering Old Colony, Inc., Northeast Petroleum Corporation and P Corporation, NEPD and OCP were Massachusetts corporations. Under Massachusetts law, a successor corporation or surviving corporation of a merger or acquisition is vested with all right and interest in all of the property of the original corporation.

So in short, with respect to the Portsmouth and Durham stores, the chain of ownership of the lessee's interest is as follows: Pickering to Pickering Old Colony, Inc., to Northeast Petroleum Corporation, to Old Colony Petroleum Company. With respect to the Epping, Exeter, Kittery and Dover stores, the chain of ownership in the lessee's interest is as follows: Pickering to Pickering Old Colony, Inc., to Northeast Petroleum Corporation, to New England Petroleum Distributors, Inc.

In conclusion, I think the evidence that has been submitted by the movant here supports summary judgment to establish that the transfers and assignments alleged did take place. I think further that the debtor is correct in its analysis of Section 365.

The plaintiff has asked the Court to declare that the debtor's efforts to renew a five-year option must fail because the debtor had defaulted pre-and post-petition. I think the problem with this analysis is that for the debtor to merely exercise its rights to renew the lease, it is required by the contract to cure these defaults prior to actually moving to assume the leases.

Now the code requires the debtor to, number one, cure or provide adequate assurances that it will promptly cure such default, but this showing and this cure must occur at the time of assumption of the lease. Number two, the code requires a

debtor to timely perform post-petition obligations. What the code does not require is a debtor to cure pre-petition defaults prior to actually assuming the lease. I think this result not only makes sense, I believe it's supported by the case law.

A debtor may exercise its option to renew a lease without assuming the lease if the lessor has not required the court to order the debtor to assume or reject within a specified time. See 111 B.R. 626, at 629. In that case, since the lessor had not filed a motion to compel, the debtor was allowed to exercise its right to renew without assuming the lease and curing the pre-petition rent. See 111 B.R. at 630.

The court cited to an analysis from an earlier opinion, explaining that the right to cure defaults that may have given right to a — may have given rise to a right to termination arises under Section 365, and operates even though a grace period to cure defaults under the lease has expired. The reason is that the federal policy to allow the debtor time to decide whether it will cure a default outweighs state law contract provisions to the contrary. See the opinion at page 630.

If a lease is rejected, the rejection constitutes a breach of the lease. A provision is made for treatment of the lessor's claim pursuant to Section 365(g). If the plaintiff's position here would be upheld, then the priority scheme of the code would be skewed. That is, a debtor would be required to cure defaults in order to timely exercise an option, even if later on the debtor chose ultimately not to assume the leases.

So what the plaintiff essentially argues is that the debtor was required to prefer the plaintiff's claim as an unsecured creditor at the time it made its election to renew the lease, or would otherwise risk forfeiture of the leasehold. I think this

clearly violates the priority scheme of the code. It is only upon assumption that a default is cured. If a debtor does not assume, the existing default becomes part of an unsecured claim and is paid with no more priority than any other unsecured creditor enjoys under the code.

As to any existing defaults on any post-petition claims, the debtor notes that this amount would be under $200. In the plaintiff's earlier unsuccessful motion for summary judgment, the post-petition claim that was apparently in default was a Durham City water and sewer bill of $163.22. The debtors asserted that there is no evidence this matter was ever brought to the attention of OCP.

While at any rate, the facts are surely disputed on the issue of a post-petition default, but if the debtor was in default for this or some other post-petition bill, this would be an issue in regard to Section 365(d)(33) and would be a violation of my earlier order extending deadlines for assuming or rejecting leases. However, for reasons I'm going to disclose in a moment, I believe these small post-petition Debts, if they exist at all, are insufficient to cause a forfeiture of these leases.

First of all, as to either pre- or post-petition defaults, the lease does not provide that the lease will be automatically terminated if the lessee is in default on monthly payments at the time it elects to renew. Instead, the lease provides that the right to extend is conditioned upon lessee not being in default. So presumably then, under the lease, the tenant would be given an opportunity to cure this default as provided in the lease. Matter of fact, paragraph 15 outlines the cure provisions after a notice of default is received.

Second, even if I were to adopt the plaintiff's position that the debtor was required to cure all pre- and post- petition defaults as a condition to renewal, but prior — but — and require that cure to occur before actually moving to assume a lease, the— regardless, the next step would be to examine whether termination could have been reversed under a state anti-forfeiture provision or other state law. See the Ninth Circuit's decision in the *Waterkist Corporation* case, 775 F.2d 1089. There's a discussion at page 1091.

In that court, the Ninth Circuit examined whether a debtor could assume a lease that had terminated pre-petition. The court held the first inquiry was whether the lease was terminated under applicable state law prior to the bankruptcy. If so, the second inquiry was whether termination would have — could have been reversed under a state anti-forfeiture provision.

Now, I understand that the present issue here of monetary default does not necessarily involve an examination of whether the lease was terminated pre-petition. Regardless, I believe the *Waterkist* case is useful, because the two-part inquiry should be the same. That is, I would be required to examine whether the existing defaults resulted in termination at the time the debtor attempted to exercise its option to renew. If so, then I would need to inquire if termination would be reversed under a state anti-forfeiture provision.

The lease is silent as to which law to apply. However, the plaintiff is a New Hampshire corporation. And in one New Hampshire case the supreme court examined whether a tenant which ultimately filed an option to renew, nonetheless — strike that.

Appendix A

In the — in one New Hampshire case, that state's supreme court examined whether a tenant, which untimely filed an option to renew, nonetheless effectively exercised the option. That's the *Fletcher* case, 404 A.2d 1106. The Court noted that courts avoid enforcing the forfeiture. See page 1109.

In *Fletcher*, the Court held although it was established that at the time — that time was of the essence in option agreements, equity would give them relief if the delay was slight, the delay had not prejudiced the landlord, and the failure to grant relief would result in such hardship to the tenant as to make enforcement unconscionable. In short, the Court felt it was required to balance the hurt. And I think a similar approach should be applied here.

I think the actual amount of the default would be de minimis. I don't believe there are any allegations that the monthly rent has not been paid, or that the lessor would suffer hardship if equity excused this particular default.

On the other hand, if a forfeiture is — would have been allowed here, the debtor would lose its lease on six stores, which pursuant to its business judgment, should be assumed. So clearly, the balance of financial harm would favor the avoidance of forfeiture because the debtor is required to cure any defaults anyway when it assumes the leases.

So as I look at all these issues, I do not believe there are any disputes of material fact. I'm going to grant the motion for summary judgment and I'm going to allow a — the debtor the opportunity to assume these leases subject to Section 365.

I'm going to direct the debtor's counsel to draft a short

order, or shorter than I have been, noting the granting of summary judgment. Serve a copy of the order on Ms. Johnsen, lodge the original with me for signature.

That completes this hearing. Be adjourned in this matter.

(Proceedings Concluded)

APPENDIX B — EXCERPTED LEASE PARAGRAPHS 3, 15 AND 19

* * *

3. The original term of this Lease shall be for a period of ten (10) years commencing on November 21, 1977.

Lessee shall have two (2) additional and successive terms of five (5) years each on the same terms and conditions as during the original term (except there shall be no extension rights beyond the two contained in this paragraph), by giving Lessor at least six (6) months' written notice of such extension prior to the expiration of the original or any extended term as the case may be, provided that Lessee's right to extend is conditioned upon the Lessee not being in default hereunder and is not in default of payments under any of the other leases described on Schedule C attached hereto.

* * *

15. (A) (l) If Lessee shall default in the payment of rent or other payments required of Lessee, and if Lessee shall fail to cure said default within fourteen (14) days after receipt of notice of said default from Lessor, or (2) if Lessee shall default in the performance or observance of any other agreement or condition on its part to be performed or observed and if Lessee shall fail to cure said default within thirty (30) days after receipt of notice of said default from Lessor, or if the nature of the default is such that it cannot be reasonably cured within said thirty (30) day period, if Lessee shall fail within said thirty (30) day period to commence to cure such default or shall fail to cure such default with due diligence within a reasonable period of time, or (3) if any person shall take this leasehold interest or any part thereof upon execution, attachment or other process of law, or

(4) if Lessee shall make an assignment of its property for the benefit of creditors, or (5) if Leasee shall be declared bankrupt or insolvent according to law, or (6) if any bankruptcy or insolvency proceedings shall be commenced by or against Leasee and, in the case of proceedings commenced against Lessee, not discharged within sixty days, or (7) if a receiver, trustee or assignee shall be appointed for the whole or any part of Leasee's property, or (8) there shall be a default of any payments under any of the leases referred to on Schedule C which are not cured within the applicable grace periods therein provided for, then in any of said cases, Lessor lawfully may immediately, or at any time thereafter, and without any further notice or demand, enter into and upon the Premises or any part thereof in the name of the whole, by force or otherwise, and hold the Premises as if this Lease had not been made, and expel Lessee and those claiming under it and remove its or their property (forcibly, if necessary) without being taken or deemed to be guilty of any manner of trespass (or Lessor may send written notice to Lessee of the termination of the term of this Lease), and upon entry as aforesaid (or in the event that Lessor shall send to Lessee notice of termination as above provided, on the fifth (5th) day next following the date of the sending of the notice), the term of this Lease shall terminate. Notwithstanding the preceding provisions of clauses (4), (5), (6) and (7) of this paragraph 15(A), if any of the events described in said clauses (4), (5), (6) and (7) occur, but any such events have not occurred with respect to any guarantor of Lessee's obligations hereunder, then Lessor may not terminate this Lease unless there is a default under some other provision of this Lease.

(B) In case of any such termination, Lessee will indemnify Lessor each month against all loss of rent and all obligations which Lessor may incur by reason of any such termination

between the time of termination and the expiration of the term of the Lease; or at the election of Lessor, exercised at the time of the termination or at any time thereafter, Lessee will indemnify Lessor each month until the exercise of the election against all loss of rent and other obligations which Lessor may incur by reason of such termination during the period between the time of the termination and the exercise of the election, and upon the exercise of the election Lessee will pay to Lessor as damages such amount as at the time of the exercise of the election represents the amount by which the rental value of the Premises for the period from the exercise of the election until the expiration of the term shall be less than the amount of rent and other payments provided herein to be paid by Lessee to Lessor during said period. It is understood and agreed that at the time of the termination or at any time thereafter Lessor may rent the Premises, and for a term which may expire after the expiration of the term of this lease, without releasing Lessee from any liability whatsoever, that Lessee shall be liable for any expenses incurred by Lessor in connection with obtaining possession of the Premises, with removing from the Premises property of Lessee and persons claiming under it (including warehouse charges), with putting the Premises into good condition for reletting, and with any reletting, including, but without limitation, reasonable attorneys' fees and brokers' fees, and that any monies collected from any reletting shall be applied first to the foregoing expenses and then to the payment of rent and all other payments due from Lessee to Lessor.

* * *

19. In consideration of the execution of this Lease and rentals to be paid hereunder, Lessor hereby gives Lessee, its successors and assigns, an option to purchase the Premises herein

Appendix B

leased at any time after the original term has expired, but during any extended term of this Lease for the sum of $150,000.00 provided this Lease in full force and effect and Lessee shall not be in default hereunder and provided that the Lessee under any of the leases described in Schedule C is not in default of any payment thereunder.

If Lessee chooses to exercise its option to purchase the Premises, it shall do so by written notice to Lessor.

Said Premises are to be conveyed by a good and sufficient quitclaim deed running to the Lessee, or to the nominee designated by the Lessee by written notice to the Lessor at least seven (7) days before the deed is to be delivered as herein provided, and said deed shall convey good and clear record and marketable title thereto, free from encumbrances, except

(a) Provisions of existing buildings and zoning laws;

(b) Existing rights and obligations in party walls which are not the subject of written agreement;

(c Real estate taxes, water charges, sewer charges and similar impositions.

(d) Any liens for municipal betterments;

(e) The within Lease;

(f) All encumbrances existing at the time of the commencement of the term hereof other than mortgages;

Appendix B

(g) Any encumbrances caused by or created with the consent *of* Lessee.

If Lessor shall be unable to give title or to make conveyance, or to deliver possession of the Premises, all as herein stipulated, then all obligations of the parties hereto to purchase and sell the Premises shall cease and shall be void and without recourse to the parties hereto, unless the Lessor elects to use reasonable efforts to remove any defects in title, or to deliver possession as provided herein, as the case may be, in which event the Lessor shall give written notice thereof to Lessee at or before the time for performance hereunder, and thereupon the time for performance hereof shall be extended for a period of thirty (30) days; If at the expiration of the extended time the Lessor shall have failed so to remove any defeats in title, or deliver possession, as the case may be, all as herein agreed, all obligations of all parties hereto to purchase and sell the Premises shall cease and this Agreement shall be void without recourse to the parties hereto.

The Lessee shall have the election, at either the original or any extended time for performance, to accept such title as the Lessor can deliver to the said Premises in their then condition and to pay therefor the purchase price without deduction, in which case the Lessor shall convey such title.

If the Premises shall be damaged or destroyed by fire or other cause between the time of the exercise of the option and the delivery of the deed, the Lessee shall nevertheless purchase the Premises, without deduction in price, but the insurance proceeds, if any, attributable thereto shall belong to Lessee.

If Lessee shall exercise its option to purchase the Premises,

Appendix B

Lessor shall be obligated to discharge any mortgage placed on the Premises by Lessor and the Lessor shall have the right to use the purchase price to pay or discharge any such mortgage.

The acceptance of a deed by the Lessee or his nominee as the case may be, shall be deemed to be a full performance and discharge of every agreement and obligation herein contained or expressed, except such as are, by the terms hereof, to be performed after the delivery of said deed.

Rent shall be adjusted as of the time of delivery of said deed.

The closing shall take place at the Registry of Deeds in which the deed is to be recorded unless the parties otherwise agree.

If Lessee exercises such option, Lessee will pay to Lessor at the time of conveyance of said premises the entire purchase price in cash or he certified check.

* * *

APPENDIX C — STIPULATED ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF ARIZONA ENTERED SEPTEMBER 17, 1997

Tad R. Smith
KEMP, SMITH, DUNCAN & HAMMOND, P.C.
P.O. Drawer 2800
El Paso, Texas 79999-2800
(915) 533-4424

D.J. Baker
WEIL, GOTSHALL & MANGES
700 Louisiana,
Suite 1600
Houston, Texas 77002
(713) 546-5000

James L. Rasmussen
James T. Reist
KEMP, SMITH, DUNCAN & HAMMOND, P.C.
P.O. Box 1276
Albuquerque, New Mexico 87103
(505) 247-2315

John J. Dawson
Susan G. Boswell
STREICH LANG
2100 First Interstate Bank Plaza
100 West Washington
Suite 2100
Phoenix, Arizona 83003
(602) 229-5200

UNITED STATES BANKRUPTCY COURT
DISTRICT OF ARIZONA

Chapter 11

Case Nos. 90-5052-PHX-GBN
to 90-5075-PHX-GBN

Adversary No. 91-974-GBN

Appendix C

IN RE:

THE CIRCLE K CORPORATION, CIRCLE K CONVENIENCE STORES, INC., CIRCLE K MANAGEMENT COMPANY, LAR-LIN, INC., FIRST CIRCLE PROPERTIES, INC., UTOTEM, INC., UTOTEM MARKETS OF ARIZONA, INC., U TOTEM OF ALABAMA INC., U-TOTE'M OF COLORADO INC., U-TOTE'M OF MIAMI, INC., TIC TOC SYSTEMS, INC., MONTERRE PROPERTIES, INC., SHOP & GO, INC., CIRCLE K GENERAL, INC., CIRCLE K HAWAII, INC., COMBINED AVIATION CO., CHARTER MARKETING COMPANY, CHARTER MARKETING COMPANY (CONNECTICUT), MR. B'S OIL CO., INC., MR. B'S FOOD MART, INC., NPI CORPORATION, OLD COLONY PETROLEUM COMPANY, INC., NEW ENGLAND PETROLEUM DISTRIBUTORS, INC., and 44TH STREET & CAMELBACK LIMITED PARTNERSHIP

DEBTORS.

COLEMAN OIL COMPANY, INC., a New Hampshire corporation,

PLAINTIFF,

vs.

THE CIRCLE K CORPORATION, et al.

DEFENDANTS.

Appendix C

JOINTLY ADMINISTERED

STIPULATED ORDER

THIS MATTER having come before the Court upon the Motion to Enforce Exercises of Purchase Options, or, in the Alternative, to Preserve Rights to Exercise Beyond Expiration of Lease Terms ("Motion to Enforce") filed on or about August 9, 1997, by The Circle K Corporation, Old Colony Petroleum Company ("OCP"), and New England Petroleum Distributors ("NEPD") (collectively, "Debtors") and upon the Motion to Stay Proceedings Pending Appeal ("Motion to Stay") filed on or about August 27, 1997, by Coleman Oil Company, Inc. ("Coleman Oil") and upon the stipulation of the parties, including Gibbs Oil Company Limited Partnership ("Gibbs Oil") and New England Petroleum Limited Partnership ("New England Petroleum") (collectively, "Debtors' Assignees"), stated herein,

IT IS FOUND, CONCLUDED AND ORDERED that:

1. Without prejudice to Coleman Oil's arguments on Appeal (defined below) or otherwise, Gibbs Oil is the assignee of the Debtors' interests in Circle K Store No. 2604 at 2975 Lafayette Road, Portsmouth, New Hampshire, more specifically described in Exhibit A herein, and Circle K Store No. 2605 at #7 Old Dover Road, Durham, New Hampshire, more specifically described in Exhibit B hereto.

2. Without prejudice to Coleman Oil's arguments on Appeal (defined below) or otherwise, New England Petroleum is the assignee of the Debtors' interests in Circle K Store No. 84802 at Rt. 16B/Old Rochester Road, Dover, New Hampshire,

more specifically described in Exhibit C hereto, and Circle K Store No. 84803 at Route 125, Epping, New Hampshire, more specifically described in Exhibit D hereto, and Circle K Store No. 84804 at 158 Front Street, Exeter, New Hampshire, more specifically described in Exhibit E hereto, and Circle K Store No. 84805 at Route 236, Kittery, Maine, more specifically described in Exhibit F hereto.

3. Further proceedings in this adversary proceeding are hereby stayed as of entry of this Order. This stay of proceedings herein shall continue until resolution of the appeal of this Court's Order entered April 6, 1994, now pending before the Ninth Circuit Court of Appeals ("Appeal"), except upon the application by any of the parties in this adversary proceeding to modify this stay for good cause. This is not a stay of the Order entered April 6, 1994, approving assumption of the leases. This stay does not affect the obligations of the parties to this stipulation to provide notices as required by law or as may be required by the terms of the leases which are the subject of this adversary proceeding. This stay does not affect the terms of the leases except to preserve rights, claims and arguments as they now stand beyond November 30, 1997, and to extend possessory rights, rights to cure defaults, if any, and rights to exercise or re-exercise purchase options (if such rights exist) beyond November 30, 1997, as provided herein.

4. Coleman Oil's responses to discovery already propounded by Debtors shall be due 30 days after determination of the Appeal, subject to further ruling on the Motion for Protective Order filed by Coleman Oil on or about August 27, 1997, 1997, as part of its Motion to Stay, or on any additional motion for protective order which may be filed by Coleman Oil after determination of the Appeal.

Appendix C

5. By their stated terms, the leases expire November 30, 1997 (assuming they were properly extended as previously found by this Court, and without prejudice to Coleman Oil's arguments on Appeal). Debtors' Assignees shall, nevertheless, remain in possession of the premises beyond November 30, 1997, if the Appeal and "Subsequent Litigation" are not finally concluded prior to that date. The Subsequent Litigation referred to in the prior sentence includes litigation in this Court and any further appeals with respect to the issues in this adversary proceeding (including the consolidated motions to assume leases) and in the Motion to Enforce (without prejudice to Coleman Oil's arguments that this Court lacks jurisdiction over certain issues in the Motion to Enforce); it also includes litigation, if any, in other courts to enforce the exercise of re-exercise of the purchase options included in the leases. During this extended period of possession, Debtors' Assignees shall continue to pay monthly rents and abide by all other terms as provided in the leases with respect to the stated final term otherwise ending November 30, 1997.

6. The foregoing requirement that rents continue to be paid is without prejudice to the arguments of Debtors and/or Debtors' Assignees that, to the extent such "rents" (whether previously paid or paid in the future pursuant to the leases and/or this Stipulated Order) are for periods following a valid exercise of purchases option(s), such rents must be credited against the purchase option prices.

7. The extended period of possession described above shall continue through:

A. the end of the first full calendar month after the expiration of any appeal period without an appeal being filed

of any final determination that the leases were not properly extended and had already terminated prior to the July 1996 notices of exercise of purchase options, or the final disposition of any appeal of any such decision; or, in the absence of such a final decision not subject to appeal, upon:

B. the end of the first full calendar month after the expiration of any appeal period without an appeal being filed of any final determination of a court of competent jurisdiction on enforcement of exercises of purchase options, or the final disposition of each appeal of any such decision.

8. The parties to this Stipulated Order contemplate that proceedings to enforce the July 1996 or any other notices of exercises of purchase options will follow final determination of the Appeal.

9. Any applicable statute of limitations on enforcement of the leases or of the exercise of purchase options included therein shall be suspended during (a) the pendency of the stay of proceedings herein as provided by ¶ 3 above, and (b) until the later of: (i) the end of the calendar month which includes the 90th day after notice to the parties of the final disposition of any and all appeals (and subsequent proceedings on any remand) of this Court's ruling, if any following Appeal, on what cure of defaults is required, if any, with respect to the assumption of the leases; (ii) the end of the first full calendar month after any date set by this Court to complete any cure of defaults required with respect to the assumption of the leases, such date to be set also being extended by the time to reach final resolution of any appeals of the Court's order setting such date.

Appendix C

10. If it is finally determined that the leases were properly extended and assumed, but that defaults existed which prevented valid exercise of purchase options in July 1996, then upon determination by this Court of such defaults to be cured, Debtors' Assignees shall be permitted to re-exercise the purchase options following cure of such defaults, without regard to any requirement of the leases that they be exercised during the extended term which expires November 30, 1997, as stated in the leases. This paragraph extends the time in which such purchase options can be exercised, if not already precluded by termination of the leases prior to November 30, 1997. However, this paragraph shall not be construed to waive or preclude Coleman Oil from maintaining (a) that defaults may have prevented or continue to prevent any exercise of any purchase options, (b) that this Court has no jurisdiction to determine issues with respect to validity of exercise of any purchase options, or (c) that any decision by this Court is not binding in subsequent litigation.

11. A certified copy of this Stipulated Order may be recorded in each County in New Hampshire and Maine where one of the properties is located. Such recorded certified copy shall suffice as notice to the world of the continuing possessory and possible purchase options rights of Debtors' Assignees, beyond the expiration of the final terms stated in the leases and any previously recorded memoranda of leases.

12. Upon termination of the continued period of possession provided by this Stipulated Order and/or upon any enforcement of exercises of the purchase options, Coleman Oil and Debtors Assignees shall sign recordable notices of termination of rights under this Stipulated Order.

Appendix C

13. This Stipulated Order shall be binding upon the successors and assigns of Coleman Oil and of Debtors' Assignees.

14. The intent of this Stipulated Order is to preserve the rights, claims and arguments of the parties hereto as they now stand, with modifications only as to possession of the properties beyond November 30, 1997, and exercise of re-exercise of purchase options after that date, depending upon the result of the now pending Appeal and Subsequent Litigation. Any ambiguity or omission or incompleteness in this Stipulated Order, shall be interpreted or resolved to accomplish that end.

15. This Court retains jurisdiction to interpret and enforce this Stipulated Order and hereby continues, pending determination of the Appeal and further request for hearing by an interested party, any hearing on remaining issues in or with respect to the Motion to Enforce and Coleman Oil's Motion to Dismiss such motion, the Debtors' Objection to Statement of Defaults filed on or about August 22, 1997, and Coleman Oil's Motion for Protective Order.

DATED this 17th day of September, 1997.

s/ George Nielsen
United States Bankruptcy Judge

Appendix C

So stipulated:

THE CIRCLE K CORPORATION
OLD COLONY PETROLEUM
NORTHEASE PETROLEUM DISTRIBUTORS, INC.,
collectively "Debtors"

BY: KEMP, SMITH, DUNCAN & HAMMOND, P.C.

By s/ James L. Rasmussen
Attorneys for Debtors
P.O. Box 1276
Albuquerque, New Mexico 87103
(505) 247-2315

COLEMAN OIL COMPANY, INC.

By: HEBERT, SCHENK, JOHNSEN & DAKE, P.C.

By s/ Carolyn Johnsen
Attorneys for Coleman Oil Company
Suite 125 Missouri Commons
1440 East Missouri Avenue
Phoenix, Arizona 85014
(602) 248-8203

GIBBS OIL COMPANY LIMITED PARTNERSHIP
NEW ENGLAND PETROLEUM LIMITED
PARTNERSHIP f/k/a
CHELSEA PARTNERS LIMITED PARTNERSHIP,
assignees of Debtors' interest

Appendix C

By: MOFENSON & NICOLETTI

By s/ Arlene R. Schuler
Attorneys for Assignees of Debtors' interest
Three Newton Executive Park
Newton, MA 02162
(617) 964-4900

[Exhibits A-F are not reprinted]